Supreme Court, U.S.
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Docket # OFFICE OF THE CLERK

Supreme Court of the United States

Thomas Lamont Dyno

Petitioner

v.

SUNY Binghamton &
WHRW FM Radio

Respondents

On Petition for Writ of Certiorari to
The United States Court of Appeals
For the Second Circuit

Petition for Writ of Certiorari

Thomas Lamont Dyno
46 Academy Street
Johnson City, New York 13790
(607) 729-4039

Questions

1. May this Court, by my original complaint, my proposed amendment of course, by rule under 28 USC 2111 or otherwise, have jurisdiction over the University, it's President acting in her official capacity, the station or it's General Manager (GM) to answer the following:
2. Are the airwaves licensed to the University and open to the Public a designated public forum?
3. Is the University radio station public broadcasting policy banning indecent and profane speech 24 hrs a day constitutional?
4. If said broadcast policy is unconstitutional may a Federal Court declare it as such and ban enforcement inside the FCC safe harbor zone?
5. Does extension of US Const. 11th Amendment immunity barring §1983 relief or relief under Ex Parte Young doctrine, violate the Strict Construction Doctrine?
6. Because the University and President are expressly responsible under NYS regulation to ensure broadcast policy propriety may either be held liable for knowingly allowing an unconstitutional policy to continue?
7. Is the GM in conferring suspending and revoking broadcast privileges under University license action under color of law?
8. If I must amend may it relate back without new process or may I commence a new action?
9. Is 2d Cir dismissal constitutional or improper?

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Decisions and Orders

True and authentic copies of all the decisions and orders in this case have been included in the Appendix, hereto.

Jurisdictional Statement

This petition for writ of certiorari is authorized by 28 USC §1254(1) to review the October 30, 2009, 2d Circuit pre briefing dismissal of my 28 USC 1291 appeal from the final decision of NDNY entered June 15, 2009: my Notice of Appeal became operative on August 24, 2009 disposition of my FRCP §60(b) application for post judgment relief. On December 2, 2009, the 2d Circuit denied my application for reconsideration and on February 26, 2010, Justice Ginsberg extended the time for me to file this petition to and including April 1, 2010 (app no. 09A791).

Constitution and the law

US Const 1st Amendment "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances".

US Const 5th Amendment "No person shall be ... deprived of life, liberty, or property, without due process of law ..."

US Const 9th Amendment "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people".

US Const 11th Amendment "The Judicial power of the United States shall not be construed to extend to

any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State".

US Const 14th Amendment "Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

42 USC §1983 "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia".

FRCP 4(h) Serving a Corporation, Partnership, or Association. Unless federal law provides otherwise or

the defendant's waiver has been filed, a domestic or foreign corporation, or a partnership or other unincorporated association that is subject to suit under a common name, must be served: (1) in a judicial district of the United States: (A) in the manner prescribed by Rule 4(e)(1) for serving an individual; or (B) by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process and — if the agent is one authorized by statute and the statute so requires — by also mailing a copy of each to the defendant; or (2) at a place not within any judicial district of the United States, in any manner prescribed by Rule 4(f) for serving an individual, except personal delivery under (f)(2)(C)(i).

FRCP4(e) Serving an Individual Within a Judicial District of the United States. Unless federal law provides otherwise, an individual — other than a minor, an incompetent person, or a person whose waiver has been filed — may be served in a judicial district of the United States by: (1) following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made; or (2) doing any of the following: (A) delivering a copy of the summons and of the complaint to the individual personally; (B) leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there; or (C) delivering a copy of each to an agent authorized by appointment or by law to receive service of process.

FRCP4(j) Serving a Foreign, State, or Local Government. (1) Foreign State. A foreign state or its political subdivision, agency, or instrumentality must be served in accordance with 28 U.S.C. § 1608. (2) State or Local Government. A state, a municipal corporation, or any other state-created governmental organization that is subject to suit must be served by: (A) delivering a copy of the summons and of the complaint to its chief executive officer; or (B) serving a copy of each in the manner prescribed by that state's law for serving a summons or like process on such a defendant.

FRCP4(m) Time Limit for Service. If a defendant is not served within 120 days after the complaint is filed, the court — on motion or on its own after notice to the plaintiff — must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision (m) does not apply to service in a foreign country under Rule 4(f) or 4(j)(1).

FRCP 15(c) Relation Back of Amendments. (1) When an Amendment Relates Back. An amendment to a pleading relates back to the date of the original pleading when: (A) the law that provides the applicable statute of limitations allows relation back; (B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out — or attempted to be set out — in the original pleading; or (C) the amendment changes the party or the naming of the party against whom a claim is

asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment: (i) received such notice of the action that it will not be prejudiced in defending on the merits; and (ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.

28 USC 2111 On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

FCC regulation §73.503(c)

"A noncommercial educational FM broadcast station may broadcast programs produced by, or at the expense of, or furnished by persons other than the licensee, if no other consideration than the furnishing of the program and the costs incidental to its production and broadcast are received by the licensee. The payment of line charges by another station network, or someone other than the licensee of a noncommercial educational FM broadcast station, or general contributions to the operating costs of a station, shall not be considered as being prohibited by this paragraph".

NYS Civil Right Law ¶2, §2. No authority can, on any pretense whatsoever, be exercised over the citizens of this state, but such as is or shall be derived from and granted by the people of this state.

SUNY regulation, document #3700 §"h" Radio Stations, Establishment & Operation of Noncommercial Broadcast. "The president of each campus at which a non-commercial broadcast station is established is responsible for the compliance of the station with all applicable statutes, rules and FCC policies. The president shall determine the appropriate administrative and operational relationships necessary to assure compliance. Such relationships should provide for any necessary review of operations which may be required to meet the nondelegable responsibility of the University, as licensee for proper and sufficient control over programming with particular reference to the policies and requirements governing such programming (e.g., obscenity, personal attacks, lottery information, fraudulent schemes, equal opportunities for political candidates, the licensee's limitations on identification of programs produced by, or at the expense of, or furnished by others)".

Statement of the Case

WHRW is a non commercial broadcast station established on the SUNY Binghamton campus. It is owned by the University and the airwave allocation is licensed to SUNY Binghamton by the FCC **[A80-A81]**.

In controversy is an express 24 hr a day broadcast ban of protected speech –i.e., profane speech and words which include indecent speech as a policy control over obscenity **[A99]**. This Court and the 2d Circuit have ruled that such out right ban of indecent speech is unconstitutional **Action for Children's Television *v* FCC** 59 F 3d 1249 citing Sable Communications of California, Inc. v. FCC, 492 U.S. 115 (1989).

NYS regulation (3700, §h) (p. 5 supra) **[A56-57, ¶B]** requires the University President under the "nondelegable responsibility" of the University to ensure that station broadcast policy controls are "proper" and in compliance with the law.

A new broadcast policy control was promulgated by the station General Manager (GM). I notified the University of said broadcast policy impropriety **[A69-78]** and the University, through her President abdicated responsibility under 3700, §h (p. 5 supra): causing me to be subjected to policy action by the GM/University employee as enforced by campus security **[A84-87]** resulting in a 1 year suspension of my broadcasting privileges granted to me under University license **[A82-83,88]** and FCC reg. §73.503(c) (p, 5 supra) **[A A55-56, ¶10(A)]**).

Ground of said suspension is that I allegedly broadcast material containing the phrase "you're not worth shitting on" **[A82]** and other unidentified material **[A83]** between the hours of 10pm and 6am and now remain permanently banished from said airwaves **[A104]** for refusing to sign and agree to policy **[A99]** after my post suspension return **[A104]**.

NDNY dismissed on jurisdictional grounds (1) that my caption names the University: that §1983 money damages against the University are barred by the 11th A. US Const; that **Ex Parte Young** relief can't enjoin corporate action only action of a State officer **[A18-19]**; and (2) sua sponte that the GM in conferring and suspending "clearance"/"access" to station airwaves or banishing persons there from are private acts without nexus to the University **[A27-30 *ff* A29-30]**.

The 2d Circuit dismissed without briefing **[A40-41]**.

Why the Court Ought to Grant Cert

Public broadcasters at a NYS Public University non commercial broadcasting facility ought to be afforded Federal protection of Our Liberty to broadcast all that the law allows. The sound recordings of Poe, Joyce, Ginsberg Burroughs and others, documentaries on Lenny Bruce, &c have serious literary, artistic, and political value and are of historical significance. There is no governmental interest compelling the mutilation or obfuscation of said works or to ban them between the hours of 10pm and 6am.

I) THE US CONST 11th A. CAPTION ISSUE OUGHT TO BE DEALT WITH AND SETTLED BY THIS COURT UNDER 28 USC 2111 HARMLESS ERROR.

By express broadcast policy **[A99]**, indecent and profane speech is under 24 hour a day broadcast ban at WHRW, a non-commercial radio station established on the SUNY Binghamton campus. The policy is enforced by campus security **[A84-87 *ff* A87]**. University abdication of "nondelegable responsibility" to ensure said broadcast policy is proper and knowingly allowing it to continue **[A45, ¶11]** is an misuse of State authority. The University is a person acting under color of law just like the AG in **Ex Parte Young** 209 U.S. 123 and while said broadcast policy ought to be enjoined the NYS AG moved to dismiss under 11thA. U.S. Const. Contrary to **Adickes *v* SH Kress** 398 US 144, 152 NDNY claims that only a State officer can be enjoined under *Young* doctrine, re-assigns "nondelegable responsibility" for the policy to the GM and dismisses sua sponte claiming the policy action complained of is private action.

Pt Hd II shows that the GM is acting under color of law University involvement is culpable inaction.

$355.00 for a new action, $60.00 for process service for a new caption naming the University President acting in her official capacity, this would obviate the NYS AG 11th A. issue, allow *Young* doctrine relief, allow me to return to broadcasting but NDNY will dismiss again on his same said private action theory. Begging the question, why allow the 11th A issue? See **[A1]**.

The only Federal remedy is to grant cert treating the caption issue as harmless error (as NDNY essentially did) and rule on his sua sponte private action theory. How his theory/decision, in conjunction with the 2d Cir pre-briefing dismissal, conflicts with the relevant decisions of this Court is discussed under Pt Hd II, and Pt Hd III, respectively. Otherwise, State College Radio broadcasters will be subject to censorship.

Paradoxically, the People of NYS are entitled to protection of Our residual rights declared under the 1st,5th, 9th & 14th A. US Const, particularly in a designated public forum: but the NYS AG is not representing us, he is representing a NYS chartered corporation that chose to abdicate responsibility under NYS law for a policy inimical to Our residual rights and doing so under pretence of 11th A. US Const, his action, proscribed by **NYS Civil Rights Law ¶2,§2** (p. 5 supra) is facilitating the continuing policy at a State University facility in Violation of the 1st A. US Const. without any NYS compelling interest.

Internal conscience compels injunction of said policy. Both governments are neutral as to the residual rights of Persons. Banning the policy enforcement in the safe harbor zone harms no one.

Myself and the mortal members of the University board, shall perish along with their President, whose resignation becomes effective July 2010 but the 1st A., US Const, the Public, the University and the policy in controversy, now continuing, under 3 different General Managers, shall live on. In the reality of War, the individuals wielding the weapon or those felled by it are the symptoms of war: guns are legal just don't use them in our port and keep your policy weapon out of Our safe harbor, avoids such conflict altogether.

Whether the corporate person or the President acting in their official capacity is named in the caption, the person to be served under **FRCP 4(h)** [*cf* (e) and (j)] (pp 2-4 supra) and NYS law was served. The NYS AG filed Notices of Appearance and took part in motion practice in both courts. Under NYS law, objection to the caption as such is harmless error and ought to be so at the Federal level too **Matter of Great Eastern Mall *v* Condon** 36 NY 2d 544, 548-549; 330 NE 2d 628,631; 369 N.Y.S.2d 672, 676

> "Rather than follow respondents' view, we would adopt a two-pronged test more consonant with modern rational thinking toward pleading and procedure: First, did the entity which is the actual respondent, if not the formally named respondent, receive adequate notice of the commencement of the proceeding? Second, would any substantial right of this entity be prejudiced by disregarding the [***676] defect or irregularity?"

The notice provided to the corporate person of which the President is a part, declares that the broadcast policy the University is expressly responsible for is

unconstitutional and the corporation is expected to be intelligent enough to know that **Wood *v* Strickland** 420 U.S. 308, 322, especially in light of the University 1st Amendment Policy **[A77-78, A92-97]**.

The same is true for the opposing attorneys *cf.* **FRCP 11(b)2**: "after an inquiry reasonable under the circumstances...[whether] defenses and other legal contentions are warranted by existing law". The law expects the NYS AG to know *inter alia* that the University is in violation of NYS regulation, that responsibility for the broadcast policy in question is nondelegable and that the action of the GM under the rule in **West *v* Atkins** 487 US 42 as addressed infra (Pt Hd II) is action under color of law

Because NYS has no demonstrable interest in the rights reserved to the people than to honor and defend them: then the extension of 11th A. immunity to bar prospective declaratory and injunctive relief against a continuing policy in clear violation of the 1st A, which the University, under NYS law, and as a corporate person, has express "nondelegable responsibility" of and for: would subvert the very power and purpose of **Ex Parte Young** doctrine to deprive me and similarly situated people of privilege and Liberty interests protected under the 1st, 5th, 9th and 14th Amendments to the US Const. without due process of law; and in violation of my equal protection rights as one sovereign in conflict with another **Chisholm *v* Georgia** 2 Dallas 419, 470. If NYS is not a person and if a corporation, is; then the latter is not the State, the same as a NYS AG isn't NYS either.

If amendment is the decided course it ought to "relate back" **FRCP 15(c)** to commencement of the action.

I believe that the NDNY decision resulted from none of these people wanting to be remembered as one that blessed the broadcast of "shit" at 4am over airwaves emanating from SUNY Binghamton, otherwise there would be no 11th A. pretence and no misstatement of the decisions of this Court.

The community standard doctrine **Miller *v* California** 413 U.S. 15 in NYS *cf* NYS Penal Law §235 is State wide **People *v* Calbud, Inc** 49 NY2d 389, 402 NE 2d 1140. **People *v* PJ Video** 68 NY2d 296, 501 NE2d 556 cert denied 479 US 1091. 94 L. Ed. 156, 107 S Ct 1301. Please take judicial notice of the DVD documentary "Inside Deep Throat" by Fenton Bailey and Randy Barbato, additional material therein shows "Binghamton Press" Emeritus David Rossie talking about community standards in Binghamton NY regarding obscenity and a local jury whom to his surprise determined that the film "Deep Throat" is not obscene. Service by publication would also serve, in part, as an apt solution to that papers' adamant failure to cover my story. Maybe there's a covert hush order or symbiotic "meeting of the minds".

And, of course, there is always the alternative: the 11th A. objection is obviated by allowing me, my pro se right to amend once of course at any time during the proceeding, which the 2d Circuit otherwise affords **Soto *v* Walker *et al*** 44 F.3d 169 citing **Branum *v* Clark** 927 F.2d 698, 705 thus allowing a pro se to amend once of course at any time even on an amendment, included on a motion for reconsideration **[A39]**; and that I'm entitled to de novo review, liberal construction of my pleading interpreted to raise the strongest argument it suggests **Triestman *v* Federal Bureau of Prisons**, 470 F3d 471.

II) DISMISSAL IS IN CONFLICT WITH RELEVANT DECISIONS OF THIS COURT ON AN IMPROPERLY STATED RULE OF LAW

The initial broadcast policy **[A70]** was promulgated by University employee/GM Richard Bellin after my annual clearance/access was conferred to me under the FCC license held by the University. The policy was then revised under University employee/GM Mark Saltzman **[A99]** these were the 1st two of the last 3 GMs under whom said policy has continued.

The act of the GM, in conferring clearance – viz., the privilege to broadcast over station airwaves for 1 year after passing the annual clearance test is an act of delegated authority under University FCC license and FCC regulation §73.503(c), p. 5 supra; under the rule in **West *v* Atkins** 487 U. S. 42 said GM action is action under color of law.

My 1st claim is the misuse of said authority **Monroe *v* Pape** 365 US 167, 172 – viz, suspension of clearance on material broadcast inside the safe harbor zone in violation of station policy – e.g., the word "shit" at 4am **[A43-44 ¶¶6, 9; A46-49 ¶¶15-23 *ff* A46, 49, ¶¶17, 23]**. Documentary evidence shows that I had been cleared and that my clearance was suspended for the spring and summer of 2006 **[A82, ¶3, A83, A87, A88]**.

The speech on which my suspension and banishment was and is based is not obscene and said policy action under color of law inside the safe harbor zone is unconstitutional. NDNY has no case that converts said action of the GM into private action he just says it's private action in order to dismiss my complaint.

Southeastern Promotions Ltd *v* Conrad 420 U.S. 546; 43 L. Ed.2d 448; 95 S. Ct. 1239 requires a formal judicial proceeding to establish obscenity prior to the abridgment of protected speech. The burden is on the person acting under color of law to show compelling State interest necessitating curtailment What NDNY considers "constitutionally adequate due process" **[A25** n 7] is inimical to and not due process.

Under the rule invoked by **Bell *v* Burson** 402 US 535 suspending, revoking or withholding a privilege conferred under authority of the State without due process is unconstitutional *inter alia* @ 539

> "[L]icenses are not to be taken away without that procedural due process required by the Fourteenth Amendment... [t]his is but an application of the general proposition that relevant constitutional restraints limit state power to terminate an entitlement whether the entitlement is denominated a "right" or a "privilege."

In conjunction with the 1st A. US Const Justice Brennan also cites **Cantwell *v* Connecticut**, 310 U.S. 296 *see also* **Thomas *v* Collins** 323 US 516.

Broadcast speech is protected under the US Const, *Action for Children's Television* (p. 6 supra). Please take judicial notice of Black's Law Dictionary, 7th Ed. p. 1244, definition of designated public forum. Their example is "a public university facility". WHRW airwaves, open to the public, is a designated public forum. The burden is on the University to show compelling interest for the policy control, so NDNY refuses to concede, that said airwaves are a designated public forum **[A21-22, n 4]**.

The 2nd claim in my original complaint is prior restraint **[A50]**. After suspension, I returned to the station, broadcast one show and then the new station GM, Mark Saltzman withheld further access until I signed and agreed to a revised policy statement **[A99]** and when I refused I was and continue to be banished from the University airwaves **[A104]**. Said precondition is prior restraint.

Until the broadcast policy promulgated under GM Bellin **[A70]** clearance requirements were strictly technical; all the speech that is allowed to be broadcast under FCC policy was allowed **[A48, ¶21]**. So that when I was a cleared broadcaster these broadcast policies did not exist, consequently, I did not have to accept these preconditions in order to be granted clearance to broadcast under the University license.

The burden is on the University to show why it is allowing this policy and preconditions to continue.

The NDNY private action dismissal theory is dependent on his own refusal to acknowledge that the airwaves are a designated public forum **[A21-22, n 4]**; and his own refusal to acknowledge the facts that lead to the irresistible conclusion that the GM policy actions are actions under color of law *inter alia* the GM has no independent authority to allow members of the public to enter the facility, use the airwaves licensed to the University nor independent authority to issue swipe cards to access the facility **[A57-58, ¶13]**. The foregoing material abilities of the GM are made possible on becoming manager of the University facility –i.e., managing access to University airwaves, under delegated authority of the University.

As a threat against any future suit brought to enjoin the policy by naming the University President acting in her official capacity or otherwise NDNY threatens to exclude Court decisions regarding inaction or else ignores the facts that show inaction **[A23, n 6 *cf* A36, A91]** and please note, contrary to his 60(b) disposition, the policy was clearly shown and alleged to be unconstitutional, not just more restrictive than FCC rules *inter alia* **[A44-50** (original complaint ¶¶ 1, 9, 11, 13, 17, 23, 27**]**

Under the NDNY decision no injunction may lie against the policy, unless I allege that the University or President was involved in the creation and enforcement of the policy – viz., his so called "causation element of my 1st Amendment claim" **[A20-22 *ff* 21-22, A29]** and then sua sponte imposes his private property enterprise theory used to dismiss §1983 claims against private insurance companies, utilities, or private nursing homes **[A29, A36-39]**.

So even if the foregoing was a correct statement of law and there were no facts showing an affirmative act of the University, this does not change the fact and point of law that the policy action by the GM is action under color of law. University enforcement of the policy and clearance by campus security is already shown **[A84-87 *ff* 87]**.

University policy inaction knowingly allowing the improper broadcast policy to continue, subjecting and causing me to be subjected to deprivation without due process of law of my privilege conferred to me under University license and the same inaction causing me to be subject to banishment from University airwaves are established facts entitling me to §1983 relief.

If the students need extra cash and were shown using University facilities as a brothel would the University have to allow that to continue too? O dear the community outcry. The violation of free speech is just as illegal it's only a matter of degree.

Allowing the broadcast policy to continue is a University policy choice between that and her duty under law *inter alia* said FCC reg that "no other considerations" are required of the broadcasters and NYS regulation to ensure the broadcast policy is proper (pp 5-6 supra). Inaction is the same as if the University declared the broadcast policy proper; and whereas the broadcast policy is not proper then the University ought to be held accountable and subject in name to at least declaratory and injunctive relief.

The station history preserved for appeal but omitted herein shows abdication as a matter of policy. Please take judicial notice of the same said history appearing on line http://www.whrwfm.org/history.php

> "**Jan. 1989** - 2 members of the Ku Klux Klan request air time on WHRW. A huge outcry results on campus and in the community. Then-President Clifford Clark sets up an "advisory committee", ostensibly to help WHRW in this, as well as future "controversial" programming matters. WHRW vehemently protests this invasion of programming autonomy. WHRW's board, in a 9-4 vote, denies the Ku Klux Klan's request because "the board could not come to a consensus as how to broadcast such a program in an educational manner." The president's committee eventually stops convening, though it is not officially dissolved".

This is not a new federalism issue. NYS courts require the same Public component as Federal courts. If NDNY and the NYS AG are allowed to have their way, the University, it's President nor the GM can be sued to enjoin the policy and as a matter of form over substance censorship assumes the preferred position while free speech becomes a prerogative of the State.

If you allow this foregoing situation to continue, you will have the same State and cultural agent relationship as in Fascist Italy. Please take judicial notice of the following book review by Silvia Valisa (Department of Foreign Languages and Literatures, San Francisco State University) of the book by Guido Bonsaver **Censorship and Literature in Fascist Italy.** University of Toronto Press, 2007 http://www.h-net.org/reviews/showrev.php?id=14302

> "Fascist censorship was not a monolithic and tightly coordinated machine of repression' (p. 5) .... Call[ing] into question the notion of absolute consistency that is often ascribed to "censorship" .... He, thus, addresses the issue of censorship as a hinge point of the relations between state and cultural agents, relations that occur 'sometimes in oppositional terms but more often in self-adjusting, complicit ones"

Cf, p. 12 supra in re the local Press.

Warden, the jailer opened the door your doctor came in and cut off my hand. O gee that's too bad, sue him. What if he cuts off my other hand? Call a lawyer first.

The most full and efficacious remedy is to issue declaratory judgment against the policy and prohibit it inside the safe harbor zone.

Further Considerations

The NDNY ignores covert motives behind inaction as addressed in cases such as **Yick Wo *v* Hopkins** 118 US 356, 362 *ff* 373 – e.g., so we hire a youngster, coerce him into doing the censoring for us, maybe distance ourselves further by hiring a middleman – you want to graduate don't you? Then you'd better keep quiet about this, listen and listen good: we're not telling you what to do, but think of your future: our success in fund raising, from the very people you may end up working for, to pay off your education debt, who don't like this sort of thing on the radio.

The "meeting of the minds" as discussed in *Adickes* is already done. The GM by cc knew I informed the University of the policy, saw no action was taken, that campus security enforced his policy action. The new GM is briefed he delivers the policy ultimatum if any dare to defy him, he calls security. As it stands the GM may ban people from the designated public forum for indecent speech in the safe harbor zone without any fear of reprisal from any court in the US.

Inaction is recognized in **Bell Atlantic *v* Twombly** 550 US 544 and NDNY opposition to the idea of "culpable State inaction" causes him to miss the pertinence of **Burton *v* Wilmington Parking Authority** 365 US 715:

> "[N]o State [Actor] may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be .... By its inaction ... the State [Actor] has ... elected to place its power, property and prestige behind the admitted discrimination ... that it must be recognized as a joint participant".

NDNY did not provide the careful decision making prescribed by the case law he's relied on which declare exceptions to the Burton precedent but also expressly declare that matters regarding Public property are outside of the ambit of those decisions. The cases NDNY relies on appertain to private property enterprises and decisions having no nexus with governmental authority. My case appertains to the property of a Public University, public broadcast airwaves licensed to the University and University employee(s) acting under University authority. The dismissal decision misstates the case law of this Court and is in conflict with a multitude of your decisions.

III) THE 2D CIRCUIT PRE-BRIEFING DISMISSAL IS A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS

The most disappointing aspect of this dismissal are the triable issues of fact NDNY raised for the 1st time in his dismissal order, without prior notice providing me no full or fair opportunity to challenge his sua sponte theory in re the GM or his claimed facts as I am entitled to under 2d Cir rule **Ramsey *v* Coughlin** 94 F3d 71. This was done while my application for preliminary relief and default judgment against the station was pending. My case and appeal were both dismissed on an application for preliminary relief against the broadcast policy in controversy.

I also asked for Trial by Jury in my original complaint as I do in my proposed amendment of course and yet the fate of my claim was decided on inter alia some David Hagerbaumer person, a self admitted liaison between the station and the University? I want to

depose and cross examine him. Who is he? Is he the middleman discussed at p 19 supra? What is his role? Does he order censorship on behalf of the University? Why did NDNY accept his affidavit introduced by the NYS AG in opposition to preliminary relief against the policy? The NYS AG in defending the policy is a waiver of her 11th A. US Const immunity claim and/or admits the policy action is under color of law. Maybe Hagerbaumer as an employee ought to be joined as a party. What justifies denying these same privileges of deposition, discovery cross examination, jury trial readily available to a licensed attorney? To me this is irregular procedure devoid of due process *cf* Adickes Black concurring @ US 176 citing US Const 7th A.

In regards to the claim of 2d Circuit inherent power to dismiss. This derives from action under a statute appertaining to incarcerated persons. The particular case regards such a person having asked that counsel be appointed. I'm not incarcerated did not proceed in forma pauperis. I paid $355.00 to file my complaint, $60.00 to have it served and then $455.00 for my 2d Circuit appeal. These are not "nominal fees". And also preserved for appeal, is an itemized bill for costs fees and disbursement in my NDNY application for default judgment against the station.

The 2d Circuit now requires that if a pro se litigant files a motion, we also have to file an additional statement, the same as that required by in forma pauperis applicants; and the court does clearly and plainly claim that it may dismiss an appeal on the basis of such statement; but fairness administered by a Federal Court is not an unreasonable due process expectation.

My 1st experience with the 2d Circuit some time ago was 1st class. Regrettably, I am morally compelled to add, that my recent pro se experiences with the 2d Circuit are the worst I've had in any court particularly in terms of verbal and emotional abuse by the pro se case worker and other persons I've spoken with; but likewise, frisked like a criminal at the magnetometers. Having to partially undress take off my shoes pull my pant legs up walk around in circles with my arms over my head, while lawyers gingerly hop skip and jump by flashing their IDs. The only experiences I can imagine worse is prison or the military and although the Binghamton NY Supreme Court is quite bad in comparison to the 3rd Dept. or the NYS Court of Appeals, how could you really know unless you are a non licensed pro se.

I suspect that the motion clerk saw that I filed the required statement and then he/she merely issued the "no arguable basis" form-order **[A40]** and **[A41]**. Or that someone requested it; but I did not request it nor was I appointed an attorney. Under the present administration there is nothing to prevent the foregoing or the following – viz., the district court takes your money claiming inter alia that you made conclusory statements, you then pay an additional $455.00 and your appeal is dismissed prior to briefing by a 9 word conclusory statement. Since **Neitzke *v* Williams**, 490 U.S. 319 was decided the pertinent statute now appears to be 28 USC 1915(e)(2)(B).

My un-incarcerated, paid for appeal to the 2d Circuit, is of right, so that this ancillary statute ought to be strictly construed, and if so, then it appertains to

incarcerated persons. **Pillay *v* INS** 45 F3d 14, 17 as the 2d Cir origin of their self created inherent power pre briefing dismissal rule does not entirely avoid strict construction as Pillay (1) appears to have been incarcerated and the self admitted dicta the Pillay panel relied on, appertained to summary affirmance of criminal convictions authorized by a statute they admit was abrogated and (2) was based upon the request of a lawyer whom Pillay asked to be appointed under 28 USC 1615, who wished to withdraw because he allegedly felt the appeal was frivolous.

To obviate any further obstacle the 2d Circuit merely claims an inherent right to do pre briefing dismissals against anyone, with the compromising admonition:

> "[W]e caution the bar that overreaching attempts to dismiss appeals as frivolous, like excessively zealous claims that adversary counsel should be sanctioned, will not be accorded a friendly reception by this court".

So what does this mean? The Court did not declare any self restraint for itself and hasn't shown any to me. Maybe it means if you're a lawyer and want a 'no arguable' against your pro se opponent don't put it in your papers call the clerk and we'll issue a 9 word conclusory statement, based on the words employed in the Neitzke decision. O "this era of burgeoning appellate dockets", the 1st Amendment, big deal, right? *cf* **People *v* Douglas** 60 NY 2d 194.

So now this pre- briefing dismissal policy extends beyond criminal cases to 1st A. civil cases and thus the civil appeal as of right becomes 'discretionary' with no intermediate appellate review. Inconvenient

subject matter like the Censorship of College Radio and other wrongdoing can be obfuscated and concealed from any appellate review, whatever.

And thus from an appointed attorney requesting court permission to withdraw on his affirmed statement, that a claim is frivolous, to the NYS AG, a private attorney, a Judge, &c making a call to a clerk asking for a 'no arguable' in a civil case, with no fear of likely review. Maybe the district judge knows the AG that knows the appellate clerk, too.

There's nothing to prevent the foregoing from happening so I would like this Court to devise and place limitations on this sort of dismissal particularly in the manner it was applied to my un-incarcerated full paying pro se civil case with triable issues present.

Dismissal as such was unwarranted and I want my money back.

Conclusion

The Broadcast policy is unconstitutional. It ought to be declared as such and it's enforcement prohibited inside the safe harbor zone. For the sake of judicial economy and unquestionable efficacy you ought to grant that relief, now; and I would be most Honored if you would grant my application to call up the record from the 2d Circuit and that I may brief any matters you may find necessary.

Otherwise please remand my case to NDNY for further proceedings on triable issues and to depose and cross examine this David Hagerbaumer person;

and that if there is any chance that damages may be awarded and if amendment is found necessary then please allow my amendment to relate back under FRCP 15(c) or allow me to bring a new action with relation back and without prejudice.

This Court ought to impose a limiting factor preventing this NDNY private property enterprise theory from being applied to other public or quasi public venues. As it stands this theory is open ended in NDNY and maybe the 2d Circuit

In this immediate instance NDNY has opened the door welcoming the censorship of College radio.

Whereas this Court has ruled that an outright ban of protected speech is not a proper control and is in fact unconstitutional *Action for Children's Television* a priori the policy in controversy is unconstitutional and ought to be struck down.

I declare under penalty of perjury that the foregoing is true and correct

Dated March 26, 2010

Respectfully submitted

Thomas Lamont Dyno

Thomas Lamont Dyno
46 Academy Street
Johnson City New York
13790-1519
697-729-4039

Office of the Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

RE: Dyno vs. WHRW FM Radio May7, 2009
CASE NUMBER: 3:09-CV-313
Dear Mr. Dyno:

The Clerk of the Court has informed me that an entry of default has been noted on the docket of the above-entitled action. Should the Plaintiff wish to move for default judgment, the appropriate motion for default judgment must be made within thirty (30) days from the date of this notice.

IT IS ORDERED.

Dated: May7, 2009
Binghamton, New York

Hon. Thomas J. McAvoy, U.S.D.J.

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF NEW YORK

THOMAS LAMONT DYNO,

Plaintiff, 3:09-C V-313

against- (TJM-DEP)

SUNY BINGHAMTON,
WHRW FM RADIO,

Defendants.

THOMAS J. McAVOY, Senior United States District Judge

ORDER

I. INTRODUCTION

Plaintiff commenced this action *pro se* pursuant to 42 U.S.C. § 1983 alleging that the suspension and subsequent revocation of his disc jockey privileges at radio station WHRW FM (the "Station"), located on the campus of Binghamton University of the State University of New York ("BU"), violated his First and Fourteenth Amendment rights. See Compl., dkt. # 1. Plaintiff seeks injunctive relief and monetary damages. See id. Defendant BU has moved pursuant to Fed. R. Civ. P. 12(b)(1) & (6) to dismiss the Complaint on the grounds that: 1) the claims against BU are barred by the Eleventh Amendment; and 2) the allegations against BU fail to state a claim upon which relief can be granted. See BU's Mot. to Dismiss, dkt. # 7. Plaintiff has opposed the motion. See Plf. Opp., dkt. # 8. The motion was returnable on the Court's May 22, 2009 motion calendar, and the Court has determined that the motion will be addressed on the written submissions alone. See Court's 5/13/09 Text Notice.

Defendant Station has not appeared in this action and the Clerk of the Court entered default against this Defendant on May 7, 2009. See Clerk's Entry of Default, dkt. # 13. On May 11, 2009, Plaintiff brought an application for an Order Show Cause wherein he sought to: (a) "correct" the caption on the Clerk's Entry of Default and on a scheduling Order issued by the Court; (b) argue, for the second time, the merits of his opposition to BU's motion to dismiss; and (c) argue, for the second time, in support of his position that there should be oral argument on BU's motion. Appl. for O.S.C., dkt. # 16. The application was denied on May 13, 2009. See 5/13/09 Order, dkt. # 17.

On May 14, 2009, Plaintiff filed another application for an Order to Show Cause, this one seeking, essentially, a preliminary injunction requiring that Plaintiffs disc jockey privileges be reinstated and enjoining Defendants from enforcing the Station's policy that prohibits the use of on-air language considered obscene and profane by the Station. P1. Emergency Motion, dkt. # 18.[1] Although Plaintiff requests a temporary restraining order, he asserts that "(t]he primary purpose of this application by the proposed order to show cause is to bring this matter before the court to be heard at the same time as the NYS AG's pending motion." Dyno Aff. ¶ 5. Plaintiff served the application, and supporting papers, on the Defendants by placing them in the U. S. mail on the

[1]Memorandum of Law, Plaintiff argues the merits of his application for temporary injunctive relief but also argues, again, in opposition to BU's motion to dismiss and for oral argument at the Court's May 22, 2009 motion calendar. P1, Mem. L. pp. 8-13.

date that he filed his application. See dkt. # 18-1, pp 2-3.

III. DISCUSSION

Plaintiff's disc jockey privileges were first temporarily suspended in March of 2006, and then indefinitely suspended after he returned to the station in June of 2007 but refused to sign an agreement that he would abide by the Station's policies. Compl. ¶¶16-7. Hence, it appears that Plaintiff has not worked in the Station in almost two years. Plaintiff's delay in bringing his application fails to support the drastic remedy of a temporary restraining order pending resolution of the sought-after preliminary injunction. See Warner Bros. Inc. v. Dae Rim Trading, Inc., 877 F.2d 1120, 1125 (2d Cir. 1989)(The purpose of a TRO is generally to preserve the status quo for a limited period of time until the Court has the opportunity to pass on the merits of the demand for a preliminary injunction.); See also New York Magazine v. Metropolitan Transp. Auth., 136 F.3d 123, 127 (2d Cir. 1998)(On a mandatory injunction which seeks to alter the status quo or provide the movant with substantially all of the relief it seeks, the moving party must make a "clear" or "substantial" showing of a likelihood of success on the merits.); Tom Doherty Assocs., Inc. v. Saban Entertainment, Inc., 60 F.3d 27, 34 (2d Cir. 1995)(("[A] mandatory injunction should issue only upon a clear showing that the moving party is entitled to the relief requested, or where extreme or very serious damage will result from a denial of preliminary relief.")(internal quotation omitted). Rather, the circumstances highlight Plaintiff's professed "primary goal" in proceeding by way of

Order to Show Cause which is to "bring this matter before the court to be heard at the same time as the NYS AG's pending motion."

It should be noted that the use of the expedited procedure of an Order to Show Cause is not intended to be used, as seems to be the case here, to circumvent the time and notice requirements of the Local Rules.[2] It should also be noted that, for the second time, Plaintiff has failed to comply with the requirements of the Local Rules addressed to applications for Orders to Show Cause. See N.Y.N.D. L.R. 7.1(e).[3]

---

[2] The procedural rules apply to *pro se* litigants, especially ones like Plaintiff who fancy themselves as having an understanding of the nuances of litigation gained through prior litigation. See Pl. Mem. L. in Support of 1st OSC, p.6 ("Other reason for dealing with [the caption] is to avoid misunderstandings. misrepresentations, and procedural quagmire [at the] 2d circuit. . . . This is not my 1st clambake there, nor here . . . . "); See also Faretta v. California, 95 5. Ct. 2525, 2541 n. 46 (1975)("The right of self-representation is not a license . . . not to comply with relevant rules of procedural and substantive law."); Edwards v. INS, 59 F.3d 5, 8 (2nd Cir. 1995)("While a *prose* litigant's pleadings must be construed liberally, . . . *pro se* litigants generally are required to inform themselves regarding procedural rules and to comply with them.").

[3] This provides: In addition to the requirements set forth in Local Rule 7.1(a)(1) and (2), a motion brought by Order to Show Cause must include an affidavit clearly and specifically showing good and sufficient cause why the standard Notice of Motion procedure cannot be used. The moving party must give reasonable advance notice of the application for an Order to Show Cause to the other parties, except in those circumstances where the movant can demonstrate, In a detailed and specific affidavit, good cause and substantial prejudice that would result from the requirement of reasonable notice.

N.Y.N.D.L.R. 7.1(e)(emphasis added).

Nevertheless, Plaintiff's papers raise the questions of: (1) whether there is state involvement in the Station's policies or actions; (2) whether there is the makings of a cognizable constitutional violation under the circumstances of this case; and (3) whether the limited exception to Eleventh Amendment immunity recognized in Ex Parte Young, 209 U.S. 123 (1908) applies in this case.

III. CONCLUSION

Therefore, for the reasons stated above, the application for a temporary restraining order is DENIED. Plaintiff's application for an Order to Show Cause is GRANTED to the extent that his application for a preliminary injunction will be setdown on the Court's June 8, 2009 motion calendar. Opposition and Reply papers shall be filed in accordance with the Local Rules. BU's motion to dismiss the action [dkt. # 7] is ADJOURNED to the June 8, 2009 motion calendar. The motions will be considered on the basis of the submissions alone (e.g. no oral argument). If there is a need for an evidentiary hearing, it will be scheduled by the Court after review of the papers.

IT IS SO ORDERED

DATED: May 18, 2009

Thomas S. McAvoy
Senior, U.S. District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

JUDGMENT IN A CIVIL CASE

Thomas Lamont Dyno **JUN 15, 2009**

vs.

CASE NUMBER: 3:09-CV-313

SUNY Binghamton, et al

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Defendant SUNY Binghamton's Motion to Dismiss is granted. Plaintiff's Motion for Preliminary Injunction is Denied. Defendant, WHRW FM Radio, is dismissed from this action for lack of subject matter jurisdiction. Plaintiff's Motion for Default Judgment against WHRW FM Radio is denied as Moot.

All of the above pursuant to the order of the Honorable Judge Thomas J. McAvoy, dated the 15th day of June, 2009.

_____
Clerk of Court

s/ _____
S. Potter
Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

THOMAS LAMONT DYNO,
Plaintiff,

-against-

JUN 15, 2009

SUNY BINGHAMTON,
WHRW FM RADIO,
Defendants,

THOMAS J. McAVOY,
Senior United States District Judge

DECISION & ORDER

I. INTRODUCTION

Plaintiff commenced this action *pro se* pursuant to 42 U.S.C. § 1983 alleging that the suspension and subsequent revocation of his disc jockey privileges at radio station WHRW FM (the "Station"), located on the campus of Binghamton University of the State University of New York ("BU"), violated his First and Fourteenth Amendment rights. See Compl., dkt. # 1. Plaintiff sues the Station and BU seeking injunctive and declaratory relief as well as monetary damages. See id.

BU moves pursuant to Fed. R. Civ. P. 12(b)(1) & (6)to dismiss the Complaint on the grounds that: 1) the claims against BU are barred by the Eleventh Amendment; and 2) the allegations against BU fail to state a claim upon which relief can be granted. See BU's Mot. to Dismiss, dkt. #7. Plaintiff opposes the motion. See Plf. Opp., dkt. #8.

Plaintiff also moves for a preliminary injunction requiring that his disc jockey privileges be reinstated and enjoining Defendants from enforcing the Station's policy that prohibits the use of on-air language considered obscene or profane by the Station. Pl. Emergency Motion, dkt. # 18. BU opposes the preliminary injunction, See BU's Resp. in Opp. [dkt. # 20], and Plaintiff has replied to BU's opposition. See Pl.'s Reply [dkt. # 23]. The Station has not appeared in this action and the Clerk of the Court entered default against this Defendant on May 7, 2009. See Clerk's Entry of Default, dkt. # 13.

II. STANDARDS OF REVIEW

a. FED. R. Civ. P. 12(b)(1)

A case is to be dismissed for lack of subject matter jurisdiction pursuant to FED. R. Civ. P. 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it. Makarova v. United States. 201 F. 3d 110, 113 (2d Cir. 2000). A plaintiff asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that it exists. See Luckett v. Bure, 290 F.3d 493, 497 (2d Cir. 2002); See also Malik v. Meissner, 82 F.3d 560, 562 (2d Cir. 1996). When a defendant moves to dismiss claims pursuant to Fed. R. Civ. P. 12(b)(1), "the movant is deemed to be challenging the factual basis for the court's subject matter jurisdiction." Cedars-Sinai Medical Ctr. v. Watkins, 11 F.3d 1573, 1583 (Fed. Cir. 1993). For purposes of such a motion, "the allegations in the complaint are not controlling ...and only uncontroverted factual allegations are

accepted as true." Id. Both the movant and the pleader are permitted to use affidavits and other pleading materials to support and oppose the motion to dismiss for lack of subject matter jurisdiction. See Makarova, 201 F.3d at 113; Filetech S.A. v. France Telecom, S.A., 157 F.3d 922, 932 (2d Cir. 1998); John Street Leasehold, LLC v. Capital Mgt. Res., L.P., 2001 WL 310629, at *2 (S.D.N.Y. March 29, 2001). "Thus, the standard used to evaluate a Rule 1 2(b)(1) motion is similar to that used for summary judgment under Fed. R. Civ. P. 56." Lopresti v. Merson, 2001 WL 1132051, at *5 (S.D.N.Y. Sept. 21, 2001).

b. FED. R. Civ. P. 12(b)(6)

A motion under FED. R. Civ. P. 12(b)(6) tests the legal sufficiency of the claims pleaded in the case. The Supreme Court recently elaborated on the standard to be used in addressing a Rule 12(b)(6) motion and again explained Rule 12(b)(6)'s interrelationship with the federal pleading standard under FED. R. Civ. P. 8. See Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949-50 (2009). In this regard, the Court explained:

> Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." As the Court held in [Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed.2d 929 (2007)], the pleading standard Rule 8 announces does not require "detailed factual allegations," but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.

> Id., at 555, 127 S. Ct. 1955 (citing Papasan v. Allain, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed.2d 209 (1986)). A pleading that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." 550 U.S., at 555, 127 S .Ct. 1955. Nor does a complaint suffice if it tenders "naked assertion[s]" devoid of "further factual enhancement." Id., at 557, 127 S. Ct. 1955.

Ashcroft, 129 S. Ct. at 1949.

To withstand a Rule 1 2(b)(6) motion the "complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Id. (quoting Twombly, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. (citing Twombly, 550 U.S. at 557). Plausibility means "more than a sheer possibility that a defendant has acted unlawfully," and a complaint that pleads facts "that are 'merely consistent with' a defendant's liability El 'stops short of the line between possibility and plausibility of 'entitlement to relief.'" Id. (quoting Twombly, 550 U.S. at 557).

While the Rule 12(b)(6) standard has long required that a court accept as true the allegations contained in a complaint, this rule does not apply to legal conclusions or to "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements." Id. (citing Twombly, 550 U.S. at 555). The liberality accorded pleadings under Rule 8 "does not unlock the doors of discovery for a

plaintiff armed with nothing more than conclusions. [O]nly a complaint that states a plausible claim for relief survives a motion to dismiss." Id., at 1950 (citing Twombly, 550 U.S. at 556).

In deciding a Rule 12(b)(6) motion, review "is generally limited to the facts and allegations that are contained in the [challenged pleading] and in any documents that are either incorporated into the [pleading] by reference or attached to the [pleading] as exhibits." Blue Tree Hotels Inv., Ltd. v. Starwood Hotels & Resorts Worldwide, Inc., 369 F.3d 212, 217 (2d Cir. 2004) (citations omitted). Dismissal is appropriate where the pleading fails as a matter of law to state a claim upon which relief can be granted. Phelps v. Kapnolas, 308 F.3d 180, 187 (2d Cir. 2002).

c. Preliminary Injunction

A preliminary injunction is an extraordinary measure that should not be routinely granted. Twentieth Century Fox Film Corp. v. Marvel Enterp., Inc., 277 F.3d 253, 258 (2d Cir. 2002). It has been said that it is "one of the most drastic tools in the arsenal of judicial remedies." Hanson Trust PLC v. SCM Corp., 774 F.2d 47, 60 (2d Cir. 1985).

The standard a court must utilize in considering whether to grant a request for injunctive relief is well-settled in this Circuit. As the Second Circuit noted in Covino v. Patrissi, 967 F.2d 73 (2d Cir. 1992), the movant must show: (a) irreparable harm and (b) either (1) a likelihood of success on the merits of the claim or (2) sufficiently serious questions going to the merits and a balance of hardships tipping

decidedly toward the party seeking injunctive relief. Id., at 77. Where, however, a movant seeks relief which will alter, rather than maintain, the status quo, or which will provide him with substantially all the relief sought, the injunction sought is properly characterized as mandatory rather than prohibitory. A party seeking a mandatory injunction must make a "clear" or "substantial" showing of the likelihood of success, as well as irreparable harm should the injunction not be granted. Jolly v. Coughlin, 76 F.3d 468, 473 (2d Cir. 1996), cert. denied, 525 U.S. 824 (1998); Tom Doherty Assocs., Inc. v. Saban Entertainment, Inc., 60 F.3d 27,34 (2d Cir.1995)("[A] mandatory injunction should issue only upon a clear showing that the moving party is entitled to the relief requested, or where extreme or very serious damage will result from a denial of preliminary relief.")(internal quotation omitted). While a factual hearing is generally required on an application for a preliminary injunction, no hearing is required where material issues are not in dispute. Maryland Casualty Co. v. Realty Advisory Board on Labor Relations, 107 F.3d 979, 984 (2d Cir. 1997).

III. BACKGROUND

The following facts are taken from the Complaint and the exhibits attached thereto, or from uncontradicted facts presented in the affidavits submitted in this matter.

WHRW FM (the "Station") is an educational and community radio station located on the campus of Binghamton University of the State University of New York ("BU"). Hagerbaumer Aff., ¶ 3. It operates

under a Federal Communications Commission ("FCC") license as a non-commercial, educational FM radio station. Id. The Station is a student-run organization that is chartered and funded by the Student Association at BU. Id. BU's "involvement with WHRW is limited to issues of the license and Federal Communication ("FCC") controls and guidelines." Compl. Ex.1 (10/27/05 Ltr. from BU President Lois B. DeFleur). The BU administration has no role in determining content or structure of the Station's programming or enforcement of Station policy. Compl. Ex.1; Hagerbaumer Aff., at ¶ 4. All Station programming, including creation of the broadcast schedule, is decided by the Station's Board of Directors and Program Director. Hagerbaumer Aff. ¶ 5; Compl. Ex. 1. The Station Manager is responsible for the oversight and implementation of all Station policies and procedures, including those relating to staffing and broadcasting privileges. Hagerbaumer Aff., at ¶ 5.

The Station allows students and non-student community members and groups to have on-air shows. Compl. Ex. 1. Plaintiff was a volunteer disc jockey at the Station and had his own on-air show. Compl. Ex. 2.

The Station has a policy that prohibits its disc jockeys from, at all times, using words, phrases, or materials that the Station's managers consider obscene or profane. Compl, Ex. 8. In this regard, the Station's policy provides:

> The FCC's definition of obscenity is material which is in the prurient interest, sexual in

> nature and lacking scientific, literary, artistic or political value. WHRW follows the FCC definition.
>
> The WHRW definition of profanity is words or material that can be interpreted [as][1] profane or vulgar. Examples of profane language include: swearing, expletives and obscene language.
>
> A 24 hour ban on obscenities and profanity is in effect at WHRW. The following are examples of obscene and profane material: "Fuck", "Motherfucker", "Shit", and other words, phrases or material that fit the two definitions as defined by the FCC, the WHRW Program Director or the WHRW General Manager.

Id.

At about 4 a.m. on March 5, 2006, while Plaintiff was on the air, he allegedly played the phrase: "you're not worth shifting on." Compl. ¶¶ 6,18 & Ex. 2.[2] On March 9, 2006, the Station's Program Director wrote to Plaintiff indicating that it had been brought to her attention that Plaintiff played this phrase and advised him that "[t]his is against WHRW policy and therefore, absolutely cannot be played EVER." Compl. Ex. 2 (emphasis in original). She further advised: "I consider this a warning. However, if this happens again, I will be forced to cancel your show." Id.

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[1]The text uses the word "or" instead of "as' which, for obvious reasons, appears to be a typographical error.

On March 18, 2006, the Station's General Manager sent Plaintiff a letter indicating:

> During your show from 10pm [sic] March 11th to 2 AM [sic] March 12th, you deliberately played material containing words you knew to be contrary to WHRW's rules and regulations. You also failed to log a station ID from the hours of 2200 to 0100 as well as failed to log on a sign-off cart. As a cleared DJ who has taken and passed the WHRW clearance exam, you know that the FCC requires WHRW to air station ID within 5 minutes of each hour and also requires that the information in the sign-off cart be played before broadcast ends.
>
> As of this moment, your clearance has been suspended pending a board meeting at 7pm on Thursday[,] March 23rd 2006 in room WB08 (next door to the station). At this meeting you be able to speak on your behalf and the future of your clearance at WHRW will be discussed.

Compl. Ex. 3; See also Compl. ¶¶ 6, 18.[3]

On March 24, 2006, the Program Director wrote in a letter to Plaintiff:

> After two separate incidents involving WHRW rules violations and a board meeting to hear

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[2]Plaintiff does not deny that he played this phrase while on the air and has contended throughout this matter that his speech on this, and another date, was protected under the First Amendment. See e.g. compl. Ex. 7 (March 27, 2006 letter from Plaintiff to Lois B. DeFluer, President of SUNY Binghamton, complaining that his "broadcasting privileges" were "arbitrarily revoked" for "airing protected speech").

> your defense, it has been the decision of the WHRW board to suspend your clearance, starting immediately, and lasting until Summer 2007. At this point, you will have to re[-]apprentice and take the clearance exam in order to regain your status as a WHRW member and engineer.

Compl. Ex. 4.

Plaintiff returned to the Station on June 23, 2007 and served as an apprentice for one broadcast show. Thereafter, however, Plaintiff refused to sign an agreement to abide by the Station's policy and he was banned "indefinitely" from broadcasting as a disc jockey at the Station. Compl. ¶ 7 & Ex. 9.

Plaintiff commenced this action on March 18, 2008. He sues both the Station and BU pursuant to 42 U.S.C. § 1983. Plaintiffs primary contention is that the Station's policy imposing a 24-hour ban on material the Station's managers consider to be profane or obscene, which Plaintiff contends is more restrictive than, and at odds with, FCC regulations banning such material only at certain hours, infringes his First Amendment right to free speech. See e.g. Compl. ¶ 9 ("the suspension of [Plaintiffs broadcasting] privilege was an infringement [of his First Amendment rights] and on a ground contrary to express FCC policy."); ¶ 10 (the Station's policy placing a 24-hour ban on obscenity and profanity is contrary to FCC regulations that allow such speech "within the safe harbor zone"); ¶¶ 20-23 (asserting

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[3]Again, Plaintiff does not deny that he played material that was in violation of the Station's policy. He also does not deny that he failed to log a station ID at the times asserted.

that the Station's policy was more restrictive than the FCC regulations). Plaintiff seeks monetary damages, a declaration that the Station's policy is unconstitutional, and an injunction restoring his broadcast privileges and preventing the Station from enforcing its policy in the future.

IV. DISCUSSION

a. Eleventh Amendment Immunity

BU argues that the action against it, a state agency, is barred by the Eleventh Amendment. Plaintiff argues that the exception to Eleventh Amendment immunity enunciated in Ex parte Young, 209 U.S. 123 (1908), applies to that portion of the action seeking prospective equitable relief.

The Eleventh Amendment serves as a jurisdictional bar to suits against a state agency regardless of the nature of the relief sought, including suits in equity. Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 100 (1984); Green v. Mansour, 474 U.S. 64, 72-73 (1985); See also Dube v. State University of New York, 900 F.2d 587, 594 (2d Cir. 1990) ("For Eleventh Amendment purposes, SUNY is an integral part of the government of the State [of New York] and when it is sued the State is the real party.") (internal quotation marks omitted) (alterations in original). However, a narrow exception to this principle allows a federal court to issue an injunction against a state official in his or her official capacity who is acting contrary to federal law. Ex parte Young, 209 U.S. 123 (1908); See Pennhurst, 465 U.S. at 102; New York Health and Hospitals Corporation et al. v. Perales, 50 F.3d 129 (2d Cir. 1995). This exception is a limited one, and is authorized to

"vindicate the supremacy of [federal] law." Ward v. Thomas, 207 F.3d 114, 119 (2d Cir. 2000). Under Ex parte Young, "a plaintiff may sue a state official acting in his official capacity - notwithstanding the Eleventh Amendment - for prospective, injunctive relief from violations of federal law." In re Deposit Ins. Agency, 482 F.3d 612, 617(2d Cir. 2007)(internal quotation marks omitted). "Such claims, however, cannot be brought directly against the state, or a state agency, but only against state officials in their official capacities." Ghent v. Moore, 519 F. Supp.2d 328, 334 (W.D.N.Y. 2007)(citing Santiago v. New York State Dep't of Correctional Services, 945 F.2d 25, 32 (2d Cir.1991) ("a plaintiff seeking prospective relief from the state must name as defendant a state official rather than the state or a state agency directly, even though in reality the suit is against the state"); Banks v. SUNY, 2007 WL 895505, at *7 (W.D.N.Y. Mar. 22, 2007) ("A state *official*...may be sued in his official capacity in a federal forum to enjoin conduct that violates the federal Constitution"); Dicks v. Binding Together, Inc., 2007 WL 1462217, at *5 (S.D.N.Y. May 18, 2007)("Plaintiffs claims for prospective injunctive relief are not barred by the Eleventh Amendment - provided, however, that Plaintiff brings those claims against a state official, rather than the state itself.").

Plaintiff has not sued a state official acting in his or her individual or official capacity. Accordingly, the exception to Eleventh Amendment immunity enunciated in Ex parte Young is inapplicable. The claims against BU must be dismissed.

b. Rule 12(b)(6)

Assuming *arguendo* that Plaintiff intended to bring an official capacity suit against a BU official, such as President DeFleur, he fails to assert a plausible claim of either a First or Fourteenth Amendment violation against such a defendant.

1. First Amendment

The First Amendment provides that "Congress shall make no law... abridging the freedom of speech... ." U.S. Const. amend. I. It has "long been established that 'the conception of liberty under the due process clause of the Fourteenth Amendment embraces the right of free speech,' and that [the First Amendment's] provisions therefore apply to state governments." Lusk v. Village of Cold Spring, 475 F.3d 480, 485 (2d Cir. 2007)(quoting Stromberg v. California, 283 U.S. 359, 368 (1931)). "The First Amendment 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." Meyer v. Grant, 486 U.S. 414,421, 108 S. Ct. 1886, 100 L. Ed.2d 425 (1988) (quoting Roth v. United States, 354 U.S. 476, 484, 77 S. Ct. 1304, 1 L. Ed.2d 1498 (1957)).

Assuming without deciding that the Station operated as a limited public forum in which the government may make only reasonable, viewpoint-neutral rules governing the content of speech allowed therein, See Husain v. Springer, 494 F. 3d 108,121-22 (2d Cir. 2007) [4] Plaintiff has failed to allege that there existed any BU policy concerning the operation of the Station, or that any BU official took any affirmative action to curtail the content of Plaintiffs speech.[5]

Rather, the allegations in the Complaint and the exhibits attached thereto indicate that BU administrators had no role in operating the Station, in determining the content or structure of the Station's programming, or in enforcing the Station's policies. See Compl. and Exs. 1-4, 6, 8-9. Although BU is involved with the Station on "issues of the license and [FCC] controls and guidelines," Compl. Ex. 1, Plaintiff's grievance is with the Station's policy which, he contends, is more restrictive than, and at odds with, the FCC's regulations on the use of obscenities and profanity. See e.g. Compl. ¶¶ 9, 10, 20-23. Thus, even construing the allegations in the pro so Complaint to raise the strongest argument they suggest, See Hughes v. Rowe, 449 U.S. 5, 9, 101 S. Ct. 173, 66 L. Ed. 2d 163 (1980), Plaintiff fails to allege a plausible claim against a state official because he fails to allege facts supporting the causation element of his First Amendment claim. See Brown v. Sheridan, 894 F. Supp. 66, 71 (N.D.N.Y. 1995)("To prevail on his claim under Title 42, section 1983, plaintiff must show that officials were 1) acting under color of state law, 2) that their actions deprived plaintiff of a right guaranteed by the constitution or the laws of the United States, and 3) that the defendants' acts were the proximate cause of the injuries and consequent damages sustained by the plaintiff.")(internal citations omitted). Simply stated, he fails to allege facts supporting the contention that a State official caused his asserted-

[4] In Husain, the Second circuit wrote: Courts have long recognized that student media outlets at public universities, and the student journalists who produce those outlets, are entitled to strong First Amendment protection. These rights stem from courts' recognition that such student media outlets generally operate as "limited public fora,' within which schools

First Amendment injury. Blyden v. Mancusi, 186 F.3d 252, 267 (2d Cir. 999) ("Liability under Section 1983 is only for those deprivations of rights caused by the defendant's behavior.").[6] Thus, even if not barred by the Eleventh Amendment, Plaintiff fails to plead a plausible First Amendment claim against a BU official.

2. Fourteenth Amendment

Again construing Plaintiffs *pro* se Complaint to raise the strongest argument it suggests, he may also be contending that (1) he had a protected property right in his broadcast privileges, and/or, (2) he had a protected liberty interest in his good reputation, both of which were deprived in violation of his Fourteenth Amendment right to due process. See Compl. ¶ 17 ("My privilege to broadcast under the FCC license is a privilege and property right conferred by the State

may not disfavor speech on the basis of viewpoint. In limited public fora, the government may make reasonable, viewpoint-neutral rules governing the content of speech allowed." Peck v. Baldwinsville Cent. Sch. Dist., 426 F.3d 617, 626 (2d Cir. 2005) (emphasis and internal citations omitted). Once the state has created a limited public forum, however, it must respect the boundaries that it has set. it may not "exclude speech where its distinction is not reasonable in light of the purpose served by the forum, nor may it discriminate against speech on the basis of its viewpoint." Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829, 115 S. Ct. 2510, 132 L. Ed.2d 700 (1995)(internal citations and quotation marks omitted) The forum itself can take many forms, yet the analysis of the constitutionality of restrictions imposed on speech made in the forum remains the same. See id. at 830, 115 S. Ct. 2510 ("The [student activity fund] is a forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable.")

[6] Plaintiff has not alleged that he expressed any viewpoint that BU administrators or the Station's managers sought to curtail.

and protected under the U.S. Constitution, which *inter alia* cannot be revoked or suspended in terms of 1st Amendment rights under the U.S. Const. without compelling interest."); id. ¶ 30 ("Plaintiff's basis for damages is (a) the stigma of being seen in the Press and in the Public eye as a person who repeatedly broadcast obscene material when in actuality Plaintiff was being wrongfully and arbitrarily punished for allegedly broadcasting material which under the Constitution and law is protected speech."). Nevertheless, Plaintiff fails to allege sufficient facts to support a legally plausible claim under either theory.

> In order to formulate a claim under the Fourteenth Amendment's Due Process Clause, [Plaintiff] must demonstrate that he possesses a constitutionally protected liberty or property interest, and that state action has deprived him of that interest. See U.S. Const. amend XIV, § 1; See also, e.g. Bd. of Regents v. Roth,

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[6]Plaintiff argues in his Memorandum of Law that President DeFleur was aware of the unconstitutional practice at the Station yet failed to intervene to stop it. In support of this proposition, he cites to DeFleur's October 27, 2005 letter which is attached to the Complaint as Exhibit A. However, Plaintiff has not sued President DeFleur in either her official or individual capacity, and he has not provided any factual allegations explaining what prompted DeFleur's October 27, 2005 letter. It would be sheer speculation to conclude that the letter was in response to a complaint about the Station's obscenity and profanity policy. While Plaintiff does allege in the Complaint that he complained to DeFleur of the Station's allegedly unconstitutional policy, the complaint was made after he was suspended and, therefore, could not have been the basis of DeFleur's October 27, 2005 letter. See Compl. ¶ 24 & Ex. 7 (Pl.'s 03/27/06 letter to DeFleur).

> 408 U.S. 564, 569, 92 S. Ct. 2701, 2705 (1972) ("The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property."). Courts "examine procedural due process questions in two steps: the first asks whether there exists a liberty or property interest which has been interfered with by the State; the second examines whether the procedures attendant upon that deprivation were constitutionally sufficient." Ky. Dep't of Corr. v. Thompson, 490 U.S. 454, 460, 109 S. Ct. 1904, 1908 (1989)(citation omitted).

Storman v. Klein, 2009 WL 1035964, at 11 (S.D.N.Y. April 20, 2009) (footnotes omitted).

The facts alleged in the Complaint fail to demonstrate that Plaintiff had a protected property interest in his voluntary disc jockey privileges at the Station. Rather, the allegations in the Complaint demonstrate that Plaintiff had a unilateral expectation of, or desire for, the" privilege" to serve as a voluntary disc jockey, and that he did so at the discretion of the Station's management and Board of Directors. There is no allegation that Plaintiff had a contract for the position or that state law somehow entitled him to the position. Without factual recitals supporting the existence of a protected property interest in the broadcast privileges at the Station, the claim is legally implausible. See Bd. of Regents v. Roth, 408 U.S. at 577, 92 S. Ct. at 2709 ("To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it.

He must, instead, have a legitimate claim of entitlement to it."); Velez v. Levy, 401 F.3d 75, 85 (2d Cir. 2005)("[O]nly where a plaintiff can demonstrate that state law confers 'a legitimate claim of entitlement' to a particular position will a property interest in that position arise."); Storman, 2009 WL 1035964, at 12 ("A plaintiff must establish that his contract or functional equivalent confers the benefit as 'virtually a matter of right.'")(quoting Schwartz v. Thompson, 497 F.2d 430, 433 (2d Cir. 1974)); See also Arteta v. County of Orange, 141 Fed. Appx. 3, 6 (2d Cir. 2005)("When an individual claims to have a property interest related to employment, courts may look to the relevant contract of employment - either explicit or implicit - or its functional equivalent to determine whether the individual has such a property interest."). Hence, any Fourteenth Amendment claim brought on this basis must be dismissed.[7]

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[7]It is also worth noting that the Station afforded Plaintiff notice of the Board meeting where the "future" of a broadcast privileges would be addressed, and afforded him an opportunity to present his defense to the Board. Thus, it would seem that the Station afforded Plaintiff constitutionally adequate due process before it suspended him from serving as a disc jockey. See Cleveland Bd. of Educ. v. Louderm ill, 470 U.S. 532, 542, 105 S. Ct. 1487, 1493 (1985)("An essential principle of due process is that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.")(quoting Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313, 70 S. Ct. 652, 656-57 (1950)); Calhoun v. N.Y. State Div. of Parole Officers, 999 F.2d 647, 653 (2d Cir.1993) ("Due process requires, as a general matter, 'an opportunity to be heard' 'at a meaningful time and in a meaningful manner.")(quoting Mathews v. Eldridge, 424 U.S. 319, 333, 96 S. Ct. 893, 902 (1976)).

To the extent that the Complaint alleges a denial of a Fourteenth Amendment liberty interest based upon purported damage to Plaintiff's reputation, the claim fails because Plaintiff has not alleged sufficient facts to satisfy the "stigma" element of the claim. See Storman, 2009 WL 1035964, at 13-15. Assuming the Station publicized a statement that Plaintiff was banned for playing profane material on two occasions and for refusing to sign an agreement to abide by the Station's policy, the statement reflects conduct that was within Plaintiffs power to correct, which did not reflect dishonesty or immorality, and which Plaintiff has not asserted was false. Thus, the claim fails to assert a plausible claim of the deprivation of a constitutionally protected liberty interest. See id at *14 ("[S]tatement[s] that an employee poorly performed her duties or acted in an improper manner, or that describe behavior or actions that are within the employee's power to correct, do not generally qualify as stigma for constitutional purposes.")(interior quotation marks and citations omitted); Schlesinger v.. N.Y. City Transit Auth., 2001 WL 62868, at 7 (S.D.N .Y. Jan. 24, 2001) ("The defamatory statements accused plaintiff only of acting in an unprofessional manner. Furthermore, the charges against plaintiff did not reflect dishonesty or immorality, which may be beyond plaintiffs power to correct. Rather, the charges primarily concerned one incident where plaintiff acted in a disrespectful manner. Because such conduct is within his power to correct, the charge is not sufficiently stigmatizing."); Storman, 2009 WL 1035964, at 15 ("[Plaintiff] also must assert that the stigmatizing statements are false, and prove the stigmatizing statements were publicized.") (citations

omitted). Accordingly, any Fourteenth Amendment due process claim based upon a purported denial of a liberty interest must be dismissed.

c. Preliminary Injunction

Turning to the sought-after preliminary injunction against the Station, it is apparent that Plaintiff seeks relief which will alter, rather than maintain, the status quo. Thus, Plaintiff must make a "clear" or "substantial" showing of the likelihood of success on his Section 1983 claims.[8] In addressing the merits of Plaintiff's claims, the initial question is whether he has alleged sufficient facts to establish that the Station, a nominally private entity, acted under color of state law with respect to Plaintiff's disc jockey privileges such to implicate Section 1983. See Flagg Bros. v. Brooks, 436 U.S. 149, 155-57 (1978)(Under § 1983, a plaintiff must prove that a defendant deprived him of a constitutional or federal statutory right while acting under the color of law.). The Court finds that he has not.

The Supreme Court has held that, to implicate 42 U.S.C. § 1983, conduct must be "fairly attributable to the State." Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982); See also Brentwood Academy v. Tenn. Secondary Sch. Ath. Ass'n, 531 U.S. 288, 306 (2001).[9]

[8]Because Plaintiff asserts a loss of his First Amendment right to free speech, the dispute on the preliminary injunction motion is whether Plaintiff can satisfy the second prong on the preliminary injunction standard. See Elrod v. Burns, 427 U.S. 347, 373 (1976)("[T]he loss of First Amendment freedoms, for even minimal periods of time, constitutes irreparable injury.'); Mitchell v. Cuomo, 748 F.2d 804, 806 (2d Cir. 1984)("[W]hen an alleged deprivation of a constitutional right is involved, .. . no further showing of irreparable injury is necessary.").

> For the purposes of section 1983, the actions of a nominally private entity are attributable to the state when: (1) the entity acts pursuant to the "coercive power" of the state or is "controlled" by the state ("the compulsion test"); (2) when the state provides "significant encouragement" to the entity, the entity is a "willful participant in joint activity with the [s]tate," or the entity's functions are "entwined" with state policies ("the joint action test" or "close nexus test") or (3) when the entity "has been delegated a public function by the [s]tate"("the public function test"). Brentwood Acad. v Tenn, Secondary Sch Ath Ass'n, 531 U.S. 288, 296, 121 S. Ct. 924, 148 L. Ed 2d 807 (2001) (citations and internal quotation marks omitted). Sylbalski v Ind Grp Hme Lvng Prog, Inc 546 F 3d 255, 257-58 (2d Cir. 2008)

Plaintiff argues that the Station is a state actor under the joint action test because BU created, funded, and held the FCC license for the Station and, thus, thus, BU was entwined with the Station.

[9]The Supreme Court wrote in Brentwood Academy: Like the state-action requirement of the Fourteenth Amendment, the state-action element of 42 U.S.C. ~ 1983 excludes from its coverage merely private conduct, however discriminatory or wrongful. Careful adherence to the 'state action' requirement thus preserves an area of individual freedom by limiting the reach of federal law and federal judicial power. The state-action doctrine also promotes important values of federalism, avoiding the imposition of responsibility on a State for conduct it could not control. Although we have used many different tests to identify state action, they all have a common purpose. Our goal in every case is to determine whether an action can fairly be attributed to the State.531 U.S. at 306 (internal citations and quotation marks omitted).

> Schlein v. Milford Hospital, Inc., 561 F.2d 427,428 (2d Cir.1977) (internal quotation marks and citation omitted)(emphases added); See also United States v. Int'l Bhd. of Teamsters, 941 F.2d 1292, 1296 (2d Cir.1991)("The question is not whether the decision to establish the [private entity] was state action, but rather whether the [private entity]'s decision to sanction [plaintiffs] may be 'fairly attributable' to the [g]overnment." (quoting Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922, 937, 102 S. Ct. 2744, 73 L. Ed.2d 482 (1982))).

Sybalski, 546 F.3d at 257-58 (emphasis in Sybalski).

Plaintiff has not alleged sufficient facts to demonstrate that BU or any of its administrators had any involvement in the creation or enforcement of the Station's policies, and there are no factual allegations that BU or its administrators played any role in Plaintiffs suspension or in the purported statements about the suspension. While Plaintiff alleges that, after he was suspended, he wrote to President DeFleur complaining of what he felt was the Station's unconstitutional policy, See Compl. ¶ 24 & Ex. 7, the Supreme Court has held that the "[m]ere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives...." Blum v. Yaretsky, 457 U.S. 991, 1004 (1982).

Plaintiff has failed to allege sufficient facts to establish that the Station's actions in drafting and enforcing its profanity and obscenity policy, or

making statements about Plaintiff's suspension, were taken under color of state law. Without state action on the Station's part, the Section 1983 claims against this defendant are fatally flawed and the sought-after injunction cannot issue. More importantly, however, is the Court's current lack subject matter jurisdiction over this matter. With the dismissal of BU from this action and the determination that the Section 1983 claims against the Station are fatally flawed, the Court lacks subject matter jurisdiction over the matter. Therefore, the Court must *sua sponte* dismiss the action against the Station despite its non-appearance in this matter. See Durant, Nichols. Houston, Hodgson & Cortese-Costa P.C. v. DuPont, 565 F.3d 56, 62-63 (2d Cir. 2009).[10]

V. CONCLUSION

For the reasons articulated above, SUNY BINGHAMTON's motion to dismiss the claims against it [dkt. #7] is GRANTED, and all claims against SUNY BINGHAMTON are DISMISSED. Plaintiffs motion for a preliminary injunction [dkt. #

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[10] In Durant, Nichols, the Second Circuit wrote:

> "It is a fundamental precept that federal courts are courts of limited jurisdiction' and lack the power to disregard such limits as have been imposed by the Constitution or Congress. Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365, 374, 98 S. Ct. 2396, 57 L. Ed.2d 274 (1978). If subject matter jurisdiction is lacking and no party has called the matter to the court's attention, the court has the duty to dismiss the action *sua sponte*. See , eg, Louisville & Nashville R.R. v. Mottley, 211 U.S. 149, 152, 29 S. Ct. 42,53 L. Ed. 126 (1908).

565 F.3d at 62-63.

18] is DENIED. Further, the Court *sua sponte* DISMISSES the action against WHRW FM RADIO for lack of subject matter jurisdiction.

IT IS SO ORDERED.

DATED: June *15,* 2009

Thomas J. McAvoy
Senior, U.S. District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

THOMAS LAMONT DYNO,

Plaintiff,

-against- **3:09-C V-313 (TJM-DEP)**

SUNY BINGHAMTON,
WHRW FM RADIO,

Defendants.

THOMAS J. McAVOY,
Senior United States District Judge

DECISION & ORDER

I. INTRODUCTION

Plaintiff commenced this action *pro se* pursuant to 42 U.S.C. *§* 1983 alleging that the suspension and subsequent revocation of his disc jockey privileges at radio station WHRW FM, located on the campus of Binghamton University of the State University of New York, violated his First and Fourteenth Amendment rights. See Compl., dkt. # 1. The Court dismissed the action by Decision and Order dated June 15, 2009. See Dec. & Ord., dkt. # 27.

Familiarity with this Decision and Order is presumed.

On June 25, 2009, Plaintiff moved pursuant to Fed. R. Civ. P. 60(b) for reconsideration of the Court's June 15, 2009 Decision and Order, and for permission to file an amended complaint. See Mot. for Recon., dkt. # 28. On July 14, 2009, Plaintiff filed a notice of appeal appealing the holding of the Court's June 15, 2009 Decision and Order to the

United States Court of Appeals for the Second Circuit. See Not. App., dkt. # 29. Both defendants thereafter filed opposition to Plaintiff's motion, See SUNY Bing. Opp., dkt. # 36; WHRW FM Radio Opp., dkt. # 3, and Plaintiff then filed a reply to this opposition. See Reply, dkt. # 40.

II. STANDARD OF REVIEW

a. Reconsideration - generally

Plaintiffs motion for reconsideration implicates both Rule 60(b) of the Federal Rules of Civil Procedure and Northern District of New York Local Rule 7.1(g).[1] A motion for reconsideration is not a substitute for an appeal. "The standard for granting

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[1]Rule 60(b) addresses the standard to be applied when relief from a final judgment or order is sought, and provides in relevant part that:

[o]n motion and just terms, the court may relieve a party. . . from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief.

Fed. R. Civ. P. 60(b).

"Local Rule 7. 1(g), on the other hand, merely details a procedure to govern motions for reconsideration, without setting out an applicable standard for determining such applications." Chao v. Magnuson, 2008 WL 2433698, at *2 fn. 2 (N.D.N.Y. June 12, 2008)(Peebles, M.J.)(citing N.D.N .Y. L. R. 7. 1(g)).

[a motion for reconsideration] is strict, and reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked - matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." Shrader v. CSX Transp., Inc., 70 F.3d 255, 257 (2d Cir. 1995); See also Friedman v. S.U.N.Y. at Binghamton, 2006 WL 2882980, at * 1 (N.D.N.Y. Oct. 5, 2006). "The high burden imposed on the moving party has been established in order to dissuade repetitive arguments on issues that have already been considered by the court and discourage litigants from making repetitive arguments on issues that have been thoroughly considered by the court [and] to ensure finality and prevent the practice of a losing party examining a decision and then plugging the gaps of the lost motion with additional matters." Nowacki v. Glosson, 2001 WL 175239, *1 (N.D.N.Y. Jan. 24, 2001) (Munson, J.) (internal citations and quotations omitted). Reconsideration "is not a vehicle for relitigating old issues, presenting the case under new theories, securing a rehearing on the merits, or otherwise taking a 'second bite at the apple." Segua Corp. v. GBJ Corp., 156 F.3d 136, 144 (2d Cir. 1998). Reargument is also not a vehicle to "advance new facts, issues or arguments not previously presented to the court." Polanco v. United States, 2000 WL 1346726, at *1 (S.D.N.Y. Sept.19, 2000) (quoting Schrader, 70 F.2d at 256). "The Northern District of New York 'recognizes only three possible grounds upon which a motion for reconsideration may be granted: (1) an intervening change in controlling law, (2) the availability of new evidence not previously available, or (3) the need to correct clear error of law

to prevent manifest injustice." Friedman, 2006 WL 2882980, at * I (quoting Nowacki, 2001 WL 175239, at *1).

b. Impact of Notice of Appeal

"The filing of a notice of appeal is an event of jurisdictional significance - it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58-59, 103 S. Ct. 400,74 L .Ed.2d 225 (1982) *(per curiam);* See United States v. Camacho, 302 F.3d 35, 36 (2d Cir.2002)(per *curiam*)(same). One limited exception to this general rule is that a district court may entertain and *deny* a motion a motion brought pursuant to Fed.R.Civ.P. 60(b) notwithstanding the pendency of an appeal from that order. Toliver v. County of Sullivan, 957 F.2d 47, 49 (2d Cir.1992) *(per curiam).* However, a court "may *grant* a rule 60(b) motion after an appeal is taken only if the moving party obtains permission from the circuit court." Id. at 49 (emphasis in original). Further, the filing of the notice of appeal divests the district court of jurisdiction to consider a motion seeking permission to file an amended complaint. Hernandez v. Coughlin, 18 F.3d 133, 138 (2d Cir.1994).

III. DISCUSSION a. Reconsideration

Plaintiff's motion for reconsideration is simply a recasting of the arguments he presented in opposition to SUNY Binghamton's motion to dismiss and in support of his motion for a preliminary injunction. His arguments are merely an attempt to plug the holes in his case and Plaintiff fails to satisfy the burden for reconsideration.

Plaintiff has not pointed to an intervening change in controlling law, and he has not established the availability of new evidence not previously available. To the extent Plaintiff presents additional facts through his affidavit, the asserted facts were previously available and, therefore, will not be considered. Further, the newly asserted facts (such as the date that he purportedly advised the SUNY Binghamton Board of Trustees that the radio station had an "unconstitutional" policy regarding the airing of profanity or obscenities), even if considered, would not change the conclusions reached in the June 15, 2009 Decision and Order. See e.g. Dec. & Ord. pp. 12-13;[2] 18-19.[3]

Finally, Plaintiff has not pointed to any portion of the Court's decision from which there is "the need to correct clear error of law to prevent manifest injustice." To the extent that Plaintiff relies on Burton v. Wilmington Parking Authority, 365 U.S.

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[2] ("Although BU is involved with the Station on 'issues of the license and [FCC] controls and guidelines,' Compl. Ex. 1, Plaintiffs grievance is with the Station's policy which, he contends, is more restrictive than, and at odds with, the FCC's regulations on the use of obscenities and profanity. See e.g. Compl. ¶¶ 9, 10, 20-23. Thus,... Plaintiff fails to allege a plausible claim against a state official because he fails to allege facts supporting the causation element of his First Amendment claim.').

[3] ("[T]he Supreme Court has held that the "[m]ere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives . . . .' Plaintiff has failed to allege sufficient facts to establish that the Station's actions in drafting and enforcing its profanity and obscenity policy, or making statements about Plaintiff's suspension, were taken under color of state law.")(quoting Blum v. Yaretsky, 457 U.S. 991, 1004 (1982)).

715, 81 5. Ct. 856, 6 L. Ed.2d 45 (1961) for the contention that the Court erred in rejecting a state action/joint participation finding between SUNY Binghamton and WHRW FM Radio, Plaintiffs argument, like the argument presented in DeBauche v. Trani, 191 F.3d 499 (4th Cir. 1999), "does not account for the actual holding in Burton nor the Supreme Court's later refinements which explain what is required to convert private action into state action." Id. at 507.

> In Burton a government agency leased space in a public parking garage to a restaurant that discriminated against blacks. The Court identified a symbiotic relationship in which "profits earned by discrimination not only contribute[d] to, but also [were] *indispensable elements in,* the financial success of a governmental agency." [Burton, 365 U.S. at 724] (emphasis added). In the "peculiar facts [and] circumstances present" in Burton, id. at 726, 81 S. Ct. 856, the Supreme Court concluded that "[t]he State ha[d] so far insinuated itself into a position of interdependence" with the restaurant that the joint participation of public and private actors made the private party's conduct state action restricted by the Fourteenth Amendment. Id. at 725, 81 S. Ct. 856. That holding, however, certainly does not stand for the proposition that all public and private joint activity subjects the private actors to the requirements of the Fourteenth Amendment. See [Blum v. Yaretsky, 457 U.S. 991, 1001 (1982)]; Jackson v. Metropolitan Edison Co., 419 U.S. 345, 357-

> 58, 95 S. Ct. 449, 42 L.Ed.2d 477 (1974); See also Lebron v. National R.R. Passenger Corp., 513 U.S. 374, 409, 115 S. Ct. 961, 130 L.Ed.2d 902 (1995) (O'Connor, J., dissenting) (noting that Burton's holding was "quite narrow" and questioning its continuing viability). In its more recent discussion of the subject, the Supreme Court articulates the numerous limits to the joint participation test, noting that "Burton was one of our early cases dealing with 'state action'. . . and later cases have refined the vague 'joint participation' test embodied in that case." [American Mfrs. Mut. Ins. Co. v. Sullivan, 119 S. Ct. 977, 988 (1999)].
>
> Id.

For the reasons discussed in the Court's decision at pages 18 to 19 (relying upon, *inter alia,* Blum v. Yaretsky, 457 U.S. 991, 1004 (1982)[4] & Sybalski v. Independent Group Home Living Program, Inc., 546 F.3d 255, 257-58 (2d Cir. 2008)[5]), Plaintiff's argument on this point is without merit.

Accordingly, Plaintiffs motion for reconsideration is denied.

[4](Holding that private activity will generally not be deemed "state action' unless the state has so dominated such activity as to convert it into state action; and that "[m]ere approval of or acquiescence in the initiatives of a private party' is insufficient.)

[5]("It is not enough, however, for a plaintiff to plead state involvement in some *activity* of the institution alleged to have inflicted injury upon a plaintiff; rather, the plaintiff must allege that the state was involved with *the activity that caused the injury* giving rise to the action.")(internal quotation marks and citations omitted, emphasis in Sybalski).

b. **Amended Complaint**

The Court lack jurisdiction to consider Plaintiff's motion to file an amended complaint, and, therefore, that portion of the motion is also denied.

IV. CONCLUSION

For the reasons discussed above, Plaintiff's motion for reconsideration and to file an amended complaint [dkt. #28] is **DENIED**.

IT IS SO ORDERED

DATED: August 24, 2009

Thomas J. McAvoy
Senior, U.S. District Judge

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCIUT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 30th day of October, two thousand nine.

Present:
Roger J. Miner,
Reena Raggi,
Peter W. Hall,
Circuit Judges.

09-cv-0313

Thomas Lamont Dyno,
Plaintiff-Appellant,
v.
SUNY Binghamton, WHRW FM Radio,
Defendants-Appellees.

Appellant, pro se, moves for injunctive relief and for an extension of time to file his brief. Upon due consideration, it is hereby ORDERED, the motions are DENIED and the appeal is DISMISSED because it lacks an arguable basis in law or fact. See Pillary v INS, 45 F.3d 14, 17 (2d Cir. 1995); Neitzke v. Williams, 490 U.S. 319, 325 (1998).

FOR THE COURT
Catherine O'Hagan Wolfe, Clerk
By: _____

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCIUT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 2nd day of December, two thousand nine.

PRESENT:
Roger J. Miner,
Reena Raggi,
Peter W. Hall,
Circuit Judges.

ORDER
Docket Number: 09-cv-0313

Thomas Lamont Dyno,
Plaintiff-Appellant,
v.
SUNY Binghamton, WHRW FM Radio,
Defendants-Appellees.

IT IS HEREBY ORDERED that the Appellent's motion for reconsideration and to vacate the order dismissing the appeal is DENIED.

FOR THE COURT
Catherine O'Hagan Wolfe, Clerk
By: _____
Judy Pisnanoni, Motions Staff Attorney

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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Thomas Lamont Dyno
Plaintiff
v
SUNY Binghamton *and*
WHRW FM Radio
Defendants

COMPLAINT
Case No.
42 USC §1983

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Thomas Lamont Dyno, as Plaintiff herein, alleges:

Jurisdictional Statement

1. This above captioned civil suit is comprised of two causes of action, brought in pursuance of 42 USC §1983 seeking declaratory injunctive and damage relief against the deprivation of Plaintiff's 1st and 14th Amendment rights and privileges protected under the U.S. Constitution and law by the policy action and inactions of defendants acting under color of law; and that this court has jurisdiction over these actions pursuant to 28 USC §§ 1331, 1343(3) and (4) and 2201.

Parties

2. I am Thomas Lamont Dyno, I reside at 46 Academy Street, Johnson City New York, 13790 telephone 729-4039 and I appear herein as Plaintiff pro se.

3. The 1st defendant is the State University of New York @ Binghamton which is located at 4400 Vestal Parkway East, Vestal, New York with Administrative Offices in the Couper Building and is herein referred to as "SUNY Binghamton".

4. The 2nd defendant is WHRW 90.5 FM, located in WB06 of the Union Bldg on the SUNY Binghamton campus, referred to herein as "WHRW" and/or "the station".

Preliminary Statement of Facts

5. The material facts for each cause of action brought by this complaint are more fully set forth below under those headings designating each cause of action.

6. Plaintiff was a disc jockey at WHRW. On or around March 9, 2006 the station program director issued a written notice threatening the cancellation of Plaintiff's show on ground that words allegedly broadcast at 4am violated station policy; on March 18, 2006 the station general manager asserted in writing that Plaintiff played material containing words that violated station rules and regulations and on March 23, 2006 based on the foregoing "incidents" Plaintiff's broadcasting privileges at the station were suspended until the summer of 2007. (*see* ¶¶ 18-19 *infra*).

7. On June 23, 2007 Plaintiff returned to the station as an apprentice under Elijah Weber-Han, broadcast one show, where after Plaintiff was prevented from broadcasting again until he signed an agreement to abide by "WHRW's policy" as set forth in a written policy statement presented to him by the general manager and on Plaintiff's refusal he was eventually banned "indefinitely".

8. Plaintiff alleges, in that the station and broadcasting transmitter is located on the SUNY Binghamton Campus, that SUNY Binghamton holds the FCC broadcasting license on behalf of the station, that the station facilities, equipment and operating monies are supplied by SUNY Binghamton, that the station is inextricably intertwined with SUNY Binghamton who is an agent of the State and that the suspension of his broadcasting privileges and eventual banishment from the station deprived Plaintiff of his rights and privileges protected under the 1st and 14th Amendments of the U.S. Constitution by persons acting under color of law.

9. Plaintiff alleges in conjunction with his 1st cause of action that his "clearance" was a privilege conferred unto him by persons acting under color of law and that his right to speak freely without infringement from persons acting under color of law is a right protected under the 1st Amendment of the US Constitution; and that the suspension of his privilege was an infringement of those rights protected under the US Constitution by persons acting under color of law without compelling interest and on ground contrary to express FCC policy.

10. In conjunction with his 2nd cause of action, after Plaintiff returned on June 23, 2007 and after broadcasting one show, the general manager prevented him from further broadcasting unless Plaintiff signed an agreement to abide by a written policy statement of WHRW which places a 24 ban on profanity and various words which FCC policy and practice shows is treated as

protected speech under the US Constitution and allowed to be broadcast within the safe harbor zone; that said policy action violates Plaintiff's Constitutionally protected right of free speech by persons acting under color of law (*see also* ¶¶ 22,27 *infra*).

11. Plaintiff seeks a court declaration that the policy actions set forth in the 1st and 2nd causes of action and the policy statement set forth in the 2nd cause of action are unconstitutional and have deprived Plaintiff of his free speech rights protected under the US Constitution; Plaintiff further requests that said policy as set forth in the 2nd cause of action be preliminarily and permanently enjoined by injunctive relief; and for compensatory and exemplary damages against SUNY Binghamton for allowing the unconstitutional policy to continue while still providing and maintaining the facilities, equipment and operating capital for the continuation of station operations, said unconstitutional policy and policy actions amounting to censorship.

As a First Cause of Action

12. The FCC educational broadcasting license for WHRW is held by SUNY Binghamton. The radio station, its broadcast transmitter all of its facilities and equipment is located on the SUNY Binghamton campus in a building owned, operated and maintained by SUNY Binghamton and all of the WHRW operating capital and monies are provided for by SUNY Binghamton.

13. On or around March 23, 2006 my broadcasting "clearance" on the radio station was wrongfully

"suspended" by the station as a person acting under color of State law and on the facts stated herein said suspension was and is in violation of my rights, privileges and immunities protected under the 1st and 14th Amendments of the U.S. Constitution.

14. During the effective times of this complaint, Lois B. DeFleur, was and is the President of SUNY Binghamton (hereinafter referred to as President DeFleur).

15. I do hereby affirm under penalty of perjury that attached hereto as **Exhibit 1 [A1]** is a true and authentic copy of an October 27, 2005 letter to me signed by President DeFleur, wherein she refers to SUNY Binghamton's "involvement" with the station in regard to "the license" and "FCC controls and guidelines".

17. My privilege to broadcast under the FCC license is a privilege and property right conferred by the State and protected under the U.S. Constitution, which *inter alia* cannot be revoked or suspended in terms of 1st Amendment rights under the US Const. without compelling interest.

18. The stated reason for the suspension regard two incidents:

(a) Where a "phrase 'you're not worth shitting on" was allegedly "played" at 4 am and that these words allegedly violated station "policy"

(b) And that between the hours of 10 pm and 2 am I allegedly "played material containing words" that were "contrary to [the station] rules and regulations"

19. I do hereby affirm under penalty of perjury that attached hereto as **Exhibit 2 Exhibit 3** and **Exhibit 4 [A79, 82, 83]** respectively are true and authentic copies of the following documents:

(a) March 9, 2006 station letter to me from Program Director Stefanie Wolf

(b) March 18, 2006 station letter to me from general manager Richard Bellin

(c) March 24, 2006 station letter to me from Program Director Stefanie Wolf

These foregoing documents allege as follows:

(i) Exhibit 2, on hearsay, alleges that "the phrase 'you're not worth shitting on' was played on the air at about 4am" and that this is allegedly against station policy and cannot be played ever, and that if this happens again my show will be cancelled;

(ii) Exhibit 3 alleges that between 10 pm and 2am I "played material containing words [I] knew to be contrary to [the station's] rules and regulations";

(iii) Exhibit 4 alleges that on the basis of "two separate incidents" a hearing was held and that my privilege was suspended until "Summer 2007".

20. I do hereby request that this court take judicial notice of the following excerpts from the Federal Communications Commission policy documents appearing on the FCC website @ http://www.fcc.gov/eb/oip/FAQ.html#TheLaw I do hereby affirm under penalty of perjury that

Attached hereto as **Exhibit 5 [A100-03]** is a true and authentic copy of said excerpts in re obscene, indecent and profane speech that indecent and profane speech with the safe harbor zone of 10pm to 6am is protected and thus allowed to be broadcast within said safe harbor zone.

21. I do hereby affirm under penalty of perjury that attached hereto as **Exhibit 6 [omitted]** is a true and authentic copy of the "WHRW station guidebook" (hereinafter referred to as "the WHRW guidebook" and/or "the guidebook") setting forth station policy during the effective times of this 1st cause of action; and that said guidebook with special emphasis on p. 35 ¶3 **[A51],** reads in part, "I will not ...willfully air obscenities (as defined by the FCC regulations, which I have studied and understand)"

22. As a continuation of the preceding paragraph, official FCC policy shown in Exhibit 5 and the WHRW guidebook shows that the established time of the broadcasts in question fall within the 10 pm to 6 am FCC safe harbor zone wherein "indecent" and "profane" material is allowed to be broadcast; in contrast the WHRW guidebook omits the FCC definition of profanity (*cf.* guidebook pp 7-8, ¶¶ 4-7 **[A16-17]**; p 9, ¶16 **[A18]**; p22 **[A31]** in re "station service") *cf.* Exhibit 5 *ff* **[A7]** "are there certain words that are always unlawful" which the FCC answers, "no" that words "depend on the context presented" and that that test only applies to broadcasts outside the safe harbor zone **[A7, last ¶, A8 ¶¶ 1,2]**.

23. The foregoing evidence shows that Plaintiff's suspension of broadcasting privileges was based on the alleged broadcast of words which occurred within the FCC safe harbor zone; and if the facts regarding the broadcasts in question are true then suspension of Plaintiff's broadcasting privileges was for broadcasting speech protected under the US Constitution, which FCC policy as shown in Exhibit 5 also considers speech protected under law; and that the suspension ofmy broadcasting privileges at WHRW by persons acting under color of law was in deprivation of my right to broadcast protected speech as a right protected under the U.S. Constitution and that said suspension and the policy it is based on is in violation of the US Constitution and law.

24. Plaintiff apprized SUNY Binghamton President Lois B. DeFleur of his wrongful suspension by letter of March 27, 2006 reminding her of her own University wide 1st Amendment policy **[A92-97]** requesting that my privilege and show be returned with action to correct the unconstitutional WHRW policy but SUNY Binghamton took no action. I do hereby affirm under penalty of perjury that attached hereto as **Exhibit 7 [A89-98]** is a true and authentic copy of my same said March 27, 2006 letter to President DeFleur with proof of service by U.S. certified mail receipt number 7099 3220 0010 3488 2996.

As a Second Cause of Action

25. On June 23, 2007 I returned to WHRW as an apprentice to Elijah Weber-Han and broadcast a show without interference

26. On June 30, 2007 I was told by the new station manager Mike Saltzman that before I would be allowed to broadcast, again, I had to sign an agreement swearing to abide by the stated policy of the station:

27. I do hereby affirm under penalty of perjury that attached hereto as **Exhibit 8 [A99]** is a true and authentic copy of the WHRW policy statement presented to me, which I refused to sign for the same reasons set forth in ¶¶ 20, 22-23 *supra* stated above. Additionally said policy statement confuses and confounds profanity with obscenity based on definitions it falsely attributes to the FCC.

28. Upon arriving home on the morning of June 31, 2007 I received an email from the station manager Saltzman suggesting that he agreed with my reasons for not signing his policy statement yet still maintained his position and by July 9, 2007 I was banned from the station, "indefinitely". I do hereby affirm under penalty of perjury that attached hereto as **Exhibit 9 [A104]** is a true and authentic copy of an email from station manager Saltzman declaring me banned from the station indefinitely.

29. Pleading ¶¶ 20, 22-23 and ¶¶ 8-11 *supra* again as if appearing at this point.

30. Plaintiff's basis of damages is (a) the stigma of being seen in the Press and in the Public eye as a person who repeatedly broadcast obscene material when in actuality Plaintiff was being wrongfully and arbitrarily punished for allegedly broadcasting material which under the Constitution and law is protected speech and (b) monetary investment in music and equipment purchased for broadcasting usage which may be proved by documentary evidence and affidavit in an approximate amount of $2,000.00.

31. I request trial by jury

32. **Wherefore** plaintiff requests that suspension of his broadcasting privileges and the effectual revocation thereof and his banishment from WHRW shall be declared unconstitutional, that the policy of WHRW as evidenced by the policy statement introduced herein and policy action(s) thereon be preliminarily and permanently enjoined, for $ 250,000.00 in compensatory and punitive damages, costs, fees and disbursements reasonable attorney fees pursuant to the equal access to justice act and any further order and relief this court deems just and equitable

I hereby affirm under penalty of perjury that the foregoing is true

Dated: March 18, 2009

THOMAS LAMONT DYNO - Pro se

STATE OF NEW YORK
COUNTY OF BROOME

EXHIBITS

Pages	Exhibits	Herein
1	De Fleur Letter 10/27/05	A79
2	Program Director 3/9/06	A82
3	General Manager 3/18/06	A83
4	Program Director 3/24/06	A88
	w/envelope	omit
5	FCC Policy Excerpts	A100-03
6	WHRW Guidebook	omit
7	to President DeFleur 3/27/06	A89-98
8	WHRW Policy Statement	A99
9	General Manager 7/9/07	A104

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

~~~~~~

Thomas Lamont Dyno
Plaintiff

vs

Lois B. De Fleur – President of SUNY Binghamton Acting in her official capacity; WHRW FM Radio General Manager acting in their official capacity
Defendants

Case No. 3:09-cv-313

VERIFIED AMENDED COMPLAINT
42 USC §1983
Hon. Thomas J. McAvoy

~~~~~~

STATE OF NEW YORK}
COUNTY OF BROOME}*ss*

Thomas Lamont Dyno, Plaintiff pro se alleges as follows:

Jurisdictional Statement

1. I'm requesting 42 USC §1983 declaratory and injunctive relief against a continuing broadcast policy banning indecent and profane speech 24 hrs. a day at the WHRW non commercial broadcasting station established on SUNY Binghamton campus; and against the joint action of campus President acting in her official capacity under color of law in refusing to ensure that said policy is in compliance with law as required by NYS regulation: knowingly causing me as a person refusing to comply with said policy to be subject to exclusion by WHRW General Manager (GM) from the State University designated public forum airwaves open to other members of the public as prospective broadcasters as enforced by

campus security is action under color of law in the abuse of nondelegable authority depriving me of free speech without due process of law and in violation of equal protection as rights secured by US Const. 1st and 14th A. and jurisdiction is conferred by 28 USC §§ 1331, 1343(3) and (4) and 2201.

Parties

2. I am Thomas Lamont Dyno, Plaintiff pro se, and I reside at 46 Academy Street, Johnson City New York, 13790 telephone 607 – 729 – 4039.

3. The 1st defendant is the President of SUNY Binghamton, Lois B. De Fleur acting in her official capacity as a person acting under color of law.

4. The 2nd defendant is University employee WHRW FM Radio General Manager **(GM)** acting in their official capacity as a person acting under color of law.

5. The 1st defendant's office is located at 4400 Vestal Parkway East, Vestal, New York in the Administrative Offices of the Couper Building and is herein referred to as "**the University President**" or "the President".

6. The 2d defendant's office is located in WB06 of the Union Bldg on SUNY Binghamton campus, and is referred to herein as "**the GM**" or "**the station**".

The Amendment In re the Caption

7. This is the 1st Amendment of my pro se complaint and is designed and intended to remove grounds for jurisdictional dismissal – *viz.*, the originally named defendants were SUNY Binghamton and

WHRW 90.5 FM. Suit against SUNY Binghamton was barred by the 11th A, US Const, under the proviso that individual officers acting in their official capacity may be sued for prospective relief under **Ex Parte Young** doctrine. Under US S Ct rule, removing the University name from the caption and adding the University President acting in their official capacity, obviates said ground for dismissal.

8. NYS General Association Law §13, in conjunction with FRCP 4(h) authorizes suit against an unincorporated association where the head of the association or all members are liable by naming the head of such association in the caption. Dismissal judgment indicates that the GM is the head of the alleged unincorporated association. The GM is a University employee that is misusing authority delegated by the University, resulting in my injury in fact, hence the office of GM, acting in their official capacity, is now named in the caption.

Statement in re Pertinent Governmental Authority

9. WHRW FM Radio is campus broadcasting facility owned by SUNY Binghamton who is the FCC non commercial educational broadcasting licensee (¶15 *infra*)

10. In conjunction with ownership, license and employment, the University nexus with station broadcasting policy are by 2 provisions of governmental authority
(A) FCC regulation §73.503(c) governing said ¶10 license

"A noncommercial educational FM broadcast station may broadcast programs produced by, or at the expense of, or furnished by persons other than the licensee, if no other consideration than the furnishing of the program and the costs incidental to its production and broadcast are received by the licensee. The payment of line charges by another station network, or someone other than the licensee of a noncommercial educational FM broadcast station, or general contributions to the operating costs of a station, shall not be considered as being prohibited by this paragraph".

(i) I was and remain such person and prospective broadcaster.

(B) SUNY regulation, document #3700 §"h" **Radio Stations, Establishment & Operation of Noncommercial Broadcast**;

"The president of each campus at which a non-commercial broadcast station is established is responsible for the compliance of the station with all applicable statutes, rules and FCC policies. The president shall determine the appropriate administrative and operational relationships necessary to assure compliance. Such relationships should provide for any necessary review of operations which may be required to meet the nondelegable responsibility of the University, as licensee for proper and sufficient control over programming

with particular reference to the policies and requirements governing such programming (e.g., obscenity, personal attacks, lottery information, fraudulent schemes, equal opportunities for political candidates, the licensee's limitations on identification of programs produced by, or at the expense of, or furnished by others)".

(i) The foregoing factors and regulations entwines the University and President with station broadcast and clearance policies.

11. Defendant GM receives remuneration for managing the station facility and administering an annual "clearance" exam which broadcasters must pass in order to be cleared to broadcast. Clearance is enforced by campus security (¶18 *infra*) and under authority delegated to the GM [¶ 10(A)] *supra* my broadcast clearance was conferred to me annually under said license (¶¶9-10 *supra*).

12. I do hereby affirm under penalty of perjury that attached hereto as **Exhibit 1 [A69-78]** is a true and authentic copy of my letter of 10/3/05 to SUNY Binghamton quoting on p. 1 thereof, a new broadcast policy ("**Policy I**") introduced by the GM:

"The Following words are never allowed on the radio: shit, piss, cunt. Cocksucker, motherfucker, fuck, tits and any other appropriate words concerning genitalia"

13. The foregoing letter was to notify the University: that **Policy I** action/enforcement would abridge

protected speech and deprive persons including myself of rights secured under the US Const; denying me a swipe card, to access the station, as all other broadcasters are provided, on my refusal to disclose my social security number (ssn) as a component of "clearance" is in violation of US Const equal protection and US law [PL 93-579] and I requested the University bring said policies into compliance with law. Discussion of FCC rules and the safe harbor zone, begins at **[A70]**; ssn disclosure in conjunction with Federal equal protection on **[A74]**; coercing broadcasters to air prerecorded disclaimers regarding obscenity inside the safe harbor zone are improper (*FCC* v Pacifica 438 U.S. 726, note 5 and text) as the station manager conceded that the FCC only requires station IDs 5 minutes before, after or on each hour **[A74-75]**.

14. On or around October 27, 2005 University President Lois B. De Fleur, responded to said October 3, 2005 letter (¶¶12-13 *supra*) wherein she declares that University involvement with the station is limited to "issues of the license and [FCC] controls and guidelines" that "any person, campus or community, is permitted to submit a proposal to the appropriate department of the station to do a show" that "many community members participate in the station and have shows" the President's letter does not indicate any intent to correct Policy I or station policy in re ssn disclosure and attached hereto as **Exhibit 2, [A79]** is a true and authentic copy of said President's *refusal* to correct said policies.

15. On or around January 2006 the University applied for FCC license renewal of the FCC non commercial educational broadcasting license held in the name of SUNY Binghamton and attached hereto as **Exhibit 3, [A80-81]** is a true and authentic copy said notice of said application as appearing on the FCC website.

Facts Regarding Suspension and Revocation of my "Clearance"

16. On March 9, 2006 the station program director issued a written notice threatening cancellation of my show on ground that words "you're not worth shitting on" allegedly broadcast at 4am violated station policy and attached hereto as **Exhibit 4, [A82]** is a true and authentic copy of said notice;

17. On March 18, 2006 the GM suspending my clearance by written notice alleging that I aired material between 10 pm and 2 am that violates station rules and attached hereto as **Exhibit 5, [A83]** is a true an authentic copy of said notice;

18. On the evening of March 18, 2006 under command of the GM and on eye witness account I was removed from a live on air safe harbor zone broadcast by campus security who escorted me from the premises and attached hereto as **Exhibit 6, [A84-A87]** is a true and authentic copy of the campus security report;

19. On March 23, 2006, my "clearance" was suspended until the summer of 2007 for speech allegedly aired in the safe harbor zone and attached hereto as **Exhibit 7, [A88]** is a true and authentic copy of my March 24, 2006 suspension notice.

20. On March 27, 2006, I expressly notified University President Lois B. De Fleur of said unconstitutional suspension; still, no action was taken by the University President to restore my "clearance", nor to correct Policy I (¶¶12-13 supra) and attached hereto, as **Exhibit 8** is a true and authentic copy of my October 27, 2006 letter to University President Lois B. DeFleur **[A89-A98]**.

21. On June 23, 2007, on eye witness account I returned to the station under apprenticeship of Elijah Weber-Han, I did one safe harbor zone broadcast; but on returning the next week, the new GM threatened to prevent me from broadcasting again until I agreed to a new "WHRW's policy" and that a true and authentic copy of said policy statement ("**Policy II**") as presented to me by the same said, new GM, is attached hereto as **Exhibit 9, [A99]** which reads in part:

> "A 24 hour ban of obscenities and profanity is in effect at WHRW. The following are examples of obscene and profane material: "Fuck", "Motherfucker", "Asshole", "Shit", and other words, phrases or material that fit the two definitions as defined by the FCC, the WHRW Program Director or the WHRW General Manager".

Indecent and Profane Speech: the safe harbor zone.

22. Under US S Ct rule, indecent and profane speech are protected under the US Const and under the compelling State interest rule may only be subject to the least restriction, and is thus indecent and

profane speech may be broadcast inside the 10 pm to 6am safe harbor zone: but an all out ban of said speech is not a least restriction nor a proper control over obscenity and such all out bans have been struck down as unconstitutional abridgments of speech **Action for Children's Television *v* FCC** 59 F 3d 1249 cited by US S Ct, in **Fox *v* FCC**.

23. Attached hereto as **Exhibit 10, [A100-A103]** is a true and authentic copy of official FCC policy as appears on their website recognizing that indecent and profane speech is constitutionally protected and may only be restricted to the hours of 10 pm to 6am known as the safe harbor zone where all of my broadcasts occur/occurred.

24. Under the present law as recognized by the FCC, the execution and enforcement of **Policy II** (¶21 *supra*), which is an express, 24 hour broadcasting ban, of profanity, and a list of words devoid of context, which would include "indecent speech", is an unconstitutional abridgement of protected speech;

25. On or around July 9, 2007 I was "indefinitely" banished from station airwaves for refusing to agree to comply with **Policy II** (¶21 *supra*); and attached hereto as **Exhibit 11 [A104]** is a true and authentic copy of the new GM's email declaring my said banishment.

Facts in re Culpable state action and inaction

26. The University broadcasting facility is established on campus and under NYS law the University President is expressly responsible to

ensure that broadcasting policy – viz., controls over obscenity, are proper (¶10 *supra*);

27. Public broadcasting is protected under the 1st A. US Const (¶22 *supra*) and as conceded by the University President these airwaves are open to members of the public for broadcasting their self produced educational programming (¶¶14, 10 supra). Under the public forum doctrine (Black's Law Dictionary 7th Ed pp 1243 – 44) these airwaves constitute a designated public forum and the actions of my suspension and banishment there from is with out due process of law **Southeastern Promotions Ltd *v* Conrad** 420 U.S. 546 43 L. Ed.2d 448; 95 S. Ct. 1239 and is in violation of equal protection; on the rule in **Freedman *v* Maryland**, 380 U.S. 51, 58, 85 S. Ct. 734, 739, 13 L.Ed.2d 649:

(A) Suspension of my clearance (¶¶11, 16-20 *supra*) on ground of speech without prior court proceeding to establish the speech as obscene is a prior restraint of speech without due process of law by persons acting under color of law.

(B) I continue to be singled out in discrimination from other members of the public in my continuing banishment from said station airwaves because I refuse to refrain from broadcasting any profanity or words from a list which would include indecent speech in the safe harbor zone is an arbitrary discrimination in violation of due process and equal protection and therefore a deprivation of rights secured to me by the US Const 1st and 14th Amendments.

28. The abdication, by the University President of said responsibility as a duty imposed by NYS law to ensure that the foregoing station broadcast policy controls over obscenity (¶¶21, 12 *supra*) are proper [¶10(B)] subjects me to said policy(s) and causes me to be subjected to equal protection violations also proscribed under the 14th A. US Const. (**Catlette *v* US** 132 F2d 902, 907)

29. Public broadcasting in the US of A is only allowed under license issued by the FCC and the GM implementing **Policy I** suspending my clearance thereon and then ordering campus security to enforce that policy against me **[A84-A87]** did so in the abuse of delegated authority – *ie.*, the FCC rules governing the non commercial license authorizing persons other than the licensee to broadcasts self produced programming from the station [¶10(A)] is authority held by the State Actor, delegated to the GM in the management of access to the station airwaves, as enforced by campus security (¶¶16-18 *supra*); and

    (A) That said policy executed by the GM in withholding access to and use of said designated public forum airwaves until a person promises to surrender their Liberty to broadcast all of the speech that the law allows is coercion by a person acting under color of law to encourage a prospective broadcaster to self censor themselves and effectively waive their Liberty of speech, or else be excluded from said designated public forum airwaves, with refusal enforced by campus security; and

(B) The University President in allowing this arrangement to continue is lending the full power, property and prestige of the University, to said policy(s) (¶¶21,12 *supra*) thereby creating the impression to the public and student body that said form of censorship is legitimate, rightfully supported, enforced and protected such that said action by the GM overtly or covertly "may be fairly treated as that of the State [Actor]" and would not and could not have occurred without her action by inaction (*Catlette* ¶29 *supra* cited in **Screws *v* US** 325 US 91, 126-127 *cf* Yick Wo *v* Hopkins 118 U.S. 356, 373);

(C) As evidenced by the continuation of these policies over the course of 3 years under 3 separate GMs that without injunctive relief against these said policies they will continue whether the encouragement is overt or covert.

30. It is also an insult to common sense and credibility to expect any person to believe that 3 separate college students assuming the position of GM would willfully, intentionally and knowingly censor speech and thus violate the rights of broadcasters and prospective broadcaster as rights secured under the 1st and 14th Amendment of the US Const unless they were coerced to do so by the University or by some other false authority purportedly acting on behalf of the University such as this David Hagerbaumer person who purports to be a liaison between the college board and the station *cf* **Pangburn *v* Culbertson** 200 F3d 65 (§1983 conspiracy). Complete confidence or complete indifference that their acts of censorship shall continue to go with impunity,

without some kind of assurance that no adverse consequences would result is incredible. So what element of education is furthered in allowing that situation to continue? There is none and there is no necessity under any law or any FCC rules, for these policies (¶¶21,12 *supra*) to continue unless to unconstitutionally censor protected speech; and the University President under the rule of **Wood *v* Strickland** 420 US 308 is expected to know that and that said policies are unconstitutional: which is most likely why she is assigned nondelegable responsibility under NYS regulation to ensure that the station broadcast policy is in compliance with the law; nonetheless protected speech is being unconstitutionally abridged at this State University broadcasting facility without compelling State interest nor any shown nor even asserted as the law otherwise requires.

31. The only way said policies may continue under the defense of the NYS AG and NDNY judgment, is if a compelling interest of NYS is shown: but as it stands there is no reason to allow persons acting under color of law to use the full coercive power of the State to leave a person injured in fact with no recourse against prima facie censorship than to sacrifice a year of my life and several thousands of dollars in the attempt to vindicate these cherished rights secured by the US Const. while the Federal courts slam both doors in my face and drop the bar.

32. I demand trial by Jury and whatever costs, fees, expenses, restitution may be available to me.

33. And lastly, declaring a difference amongst the Circuit courts on this issue: extending by implication the 11th A, US Const., to bar 42 USC §1983 damage relief against persons acting in their official capacity when employed by a State University is a violation of the strict constriction doctrine depriving me of equal protection rights as an equal sovereign without subjects with a competing interest where the State is still required under Ex Parte Young doctrine to show a compelling State interest to even claim any interest at all: then on special damages to me resulting from the willful intentional and knowing continuation of said policies in violation of the US Const, I demand $1, 000,000.00 in exemplary damages with my basis for compensatory damages in the amount of $_____.oo for the investment in broadcast equipment that has depreciated in value because it has no other use and with said quantum to be proven on trial.

Wherefore plaintiff requests judgment as follows (1) a declaration that by virtue of the 11th A. US Const., that the 2d Circuit bars damage relief against a State University or person acting in their official capacity on behalf thereof, then there can be no Res judicata or collateral estoppel bar against such action if pursued in the NYS Court of Claims under NYS law, as the State have waived immunity under the NYS Court of Claims Act or else for the aforesaid award of damages in said amount of $1,000,000.00; and (2) that the broadcast policies of the station imposing a 24 hour ban of indecent and profane speech, as

implemented executed and enforced against broadcasts inside of the safe harbor zone shall be declared unconstitutional and permanently enjoined by prohibitory injunctive relief; (3) that my clearance to broadcast inside the safe harbor zone during the summer shall be restored; and (4) upon my one time proof of identity by presentation of my valid U.S. passport that I shall then enjoy equal unimpeded access to the broadcasting facilities by appropriate person or persons providing to me a swipe card or key to be kept in my possession at all times the same as other persons with access have; and (5) that I shall also be awarded additionally, costs, fees, disbursements and reasonable attorney fees pursuant to 42 USC ¶1988 or under any authority which so allows and (6) for any further order and relief which to this court seems just and/or equitable.

I hereby affirm under penalty of perjury that the foregoing is true

Dated: January 15, 2010

THOMAS LAMONT DYNO - Pro se

Sworn to before me this 15th Day
Of January 2010

Exhibit List for Amended Complaint

Exhibits	Date	Description	Herein
1	10/3/05	My letter to SUNY Binghamton	A69-A78
2	10/27/05	University President's response	A79
3	1/2006	FCC notice	A80-81
4	3/9/06	Warning from Program Director	A82
5	3/18/96	Notice from GM	A83
6	3/18/06	Campus Security Report	A84-87
7	3/24/06	Notice of Suspension	A88
8	3/27/06	Letter to U. President in re My suspension	A89-98
9	6/2007	Policy Statement	A99
10		Official FCC policy from their website	A100-03
11	7/9/07	Email GM notice of banishment	A104

Thomas Lamont Dyno
46 Academy Street
Johnson City. New York 13790-1519
Telephone: (607) 729-0839

October 3, 2005

Binghamton University College Board of Trustees
Binghamton University
P.O. Box 6000
Binghamton, New York 13902-6000

Policy of WHRW, which the College Board of Trustees holds the Broadcasting License to

Is in Violation of the United States Constitution and Misrepresents the Law

This is a follow up to my notice mailed to you and hand delivered to the WHRW General Manager dated September 16, 2005: regarding my allegations that the censorship policy of WHRW is unconstitutional, misrepresents the law and the actual policy of the FCC.

My avowed aim is to bring your free format WHRW radio station out of the Eisenhower dark ages and into the new millennium -*viz.*, that the policies of said station are conformed to established law; rather than based on misrepresentations thereof: used to mislead and intimidate college students by exploiting their naïveté and in ruthlessly exploiting the good graces of this University in using its broadcasting license to convey misrepresentations to the general public while censoring speech protected under the United States Constitution.

In light of the facts presented herein and in order to maintain the integrity of this University and its

express policy regarding Free Speech', it is now imperative that WHRW shall be ordered by the license holder to conform it's censorship policy to established law.

In 1955 the late Poet Allen Ginsberg authored "Howl" which is a work expressing his life under the Eisenhower/McCarthy era, where persons were forced to abandon any aspirations beyond the blasé and mundane or else forced to seek refuge in Greenwich Village or San Francisco to live amongst other 'undesirables' and still face persecution, arbitrary segregation and general social abandonment. Soon after publication, Allen's work was challenged as obscene on the same ground used by this station to censor similar works of art. The following is WHRW station policy [quoted from a paper issued by WHRW entitled "WHRW PA Rules -- Fall 2005"Il

> "FCC guidelines and other Broadcasting rules.... 3. ... The Following words are never allowed on the radio: shit, piss, cunt, cocksucker, motherfucker, fuck, tits and any other appropriate words concerning genitalia".

The following is the express policy of the FCC available on the World Wide Web":

21. Obscenity and Indecency. it is a violation of federal law to broadcast obscene, indecent or profane language. Obscene speech is not protected by the First Amendment and cannot be broadcast at any time. To be obscene, material must meet a three prong test: (1) an average person, applying contemporary community standards, must find that the material, as a whole, appeals to the prurient

interest; (2) the material must depict or describe, in a patently offensive way, sexual conduct specifically defined by applicable law and (3) the material, taken as a whole, must lack serious literary, artistic, political, or scientific value.

The Commission has defined broadcast indecency as "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory organs or activities." Because indecent material is protected by the First Amendment, it cannot be banned entirely. It may, however, be restricted to avoid its broadcast during times of the day when there is a reasonable risk that children may be in the audience. Thus, broadcasts that fall within the definition of indecency and are aired between 6:00 a.m. and 10:00 p.m. are subject to indecency enforcement action.

Regarding profanity, key court decisions have defined it as "words importing an imprecation of divine vengeance or implying divine condemnation, so used as to constitute a public nuisance." Thus, the courts have severely limited the FCC's ability to take action in this area".

In 1956 "Howl" was formally declared by a Federal Court to not be obscene and in point of law the work is protected speech: therefore there is no legal reason why a sound recording of "Howl" cannot be aired in it's uncensored entirety on WHRW at *the very least* after 10 pm and before 6 am: but according to present station policy, vigorously defended by the General Manager and several outspoken supporters, said work cannot be aired unless various words are

bleeped out. Here is a web-link to "Howl"

https://notes.utk.edu/greenburg/0/6f7dd8b9270db5c585256d0d001e0a93?OpenDocument

Here is a link to material presenting a brief description of the publication of "Howl", by the publisher Lawrence Ferlinghetti, it's challenge in court as obscene and judgment thereon

http:www.pbs.org'/ewshour/bb/entertainment/july-dec02/ferlinghetti l2-27.html

If "Howl" can be aired, there is no reason Lou Reed songs such as "The Last Great American Whale" in its uncensored entirety cannot be aired as well.

In my attempt to orally move the adamant general manager, I attempted to explain the point of law that words are not obscene per Se, as is obvious from the so called 3 prong test quoted above. I used the example of some kid mindlessly saying 'oh shit I fucked this up' into the broadcast microphone and that this might be similar to distinctions made between nudity used to convey an intended form of expression and private nude sun bathing which generally isn't considered to be any type of intended expression at all.

The principle distinction/determinative (standard) is the same in the law of nuisance and zoning; the latter being an extension of the law of nuisance. Former US Supreme Court Justice Sutherland said {paraphrase} in **Euclid *v* Ambler Realty** 272 US 365 @387-388 that you have to consider the thing in it's circumstances and locality and not in the abstract. He uses the example of' a pig in the parlor instead of the barnyard'.

So the aforesaid mindless verbiage broadcast -e.g., 'no fucking ass I just broke the cock sucking head set' is arguably *unprofessional conduct* and not actually political speech or expression like laying about nude in your back yard would not appear to constitute any particular form of intended expression; and I think a good educational distinction to be taught in terms of broadcasting. However, the point here is that it's not the words *per se* but their usage and circumstance - e.g., laying barcassed on your front yard instead of in your backyard.

It is a misrepresentation to blame the FCC for the unconstitutional policy of WHRW. The clear meaning of the FCC policy quoted above, is if something is not obscene but *appears* to fall within the FCC "indecency" guidelines then that the material may at the very least be broadcast between 10 pm and 6 am but under no circumstances can you or the people running the station in legally censor or mutilate it with bleeps or otherwise during said hours.

In a private letter I sent to the General Manager, I also pointed out that "tits" aren't legally considered to be a sexual organ and therefore this particular word doesn't even fall under any aspect of the foregoing FCC guidelines at all yet he insists the word is obscene and may never be broadcast in a sound recording or said at any time over the air. His position has no rational basis in law or FCC policy. Here is the link to a case I attempted to show him regarding Public Nudity and protected expression *ff*. last two pars of concurring opinion and footnote 3

http://www.law.cornell.edu/nyctap/search/display.html?terms=nudity&url=/nyctap/I92_0160.htm

A pragmatic beginning rule might be ordering the station to allow material ruled not obscene to be aired between 10 pm and 6 am, such as "Howl". This would potentially apply to W.S. Burroughs and Lenny Bruce material. Even Governor Pataki posthumously pardoned Lenny Bruce at the end of 2003 in re the 1970 court reversal of Bruce's 1964 obscenity conviction"

There are two additional aspects to this matter, the first regarding violation of U.S.

Constitutionally protected equal protection in conjunction with my privilege of broadcasting conferred unto me upon my passing the WHRW station administered FCC clearance exam. The station refuses to give me a swipe card like everyone else has who have been granted broadcasting privileges: allowing them to gain free and unimpeded access to the building and the station while I can't because I refuse to disclose my social security number. The General Manger who administered said test knows whom I am, where I live and that I passed said test. You and the station have all of the information you need to have me arrested or serve upon me a civil summons. There is no need for you or WHRW to have my social security number[IV]. I passed the test and I want my swipe card.

Lastly, the station policy of forcing DJ's to immediately read a disclaimer in the event someone accidentally allows "tits", "shit", &c to be aired on a sound recording regardless of whether the material is protected is a serious interference and intrusion with/of protected speech. It is an unnecessary intrusion, distraction from and derogation of the

work; and that policy ought to be immediately abolished. If the station wants to have a disclaimer policy, then it ought to be limited to the beginning of a show where it is the least intrusive.

For so called "Free Format" radio I'd never imagine so many impositions placed upon the person attempting to broadcast; nor an atmosphere so chilling in regard to the U.S. Constitution, free speech and protected works of art. As recently admitted by the present General Manager, all that is required is that the station shall be identified on the hour; yet all of these foregoing policies are enforced with threats to revoke a DJ's "clearance" -i.e., knuckle under and submit or we don't let you in. Very easy to enforce against me since I have to be let in by some other person than myself and oftentimes in Summer or on Winter Holidays end up spending considerable time waiting outside for someone to happen by and let me in, particularly when no one answers the phone or no one is at the station. To show you how thoroughly arbitrary this policy actually is, three separate people from security let me into the station, two of which never knew the station existed and another shocked that I had no other means of obtaining access. Hence, punishment, for refusing to disclose my social security number is having me walk across the quad to get a key from security or wait for security to come by to let you in. To whom do I click my heels and Heil? Or is it heel? So nice to feel so ... welcomed. Is that your intent?

When the Power of Cruelty obfuscated the Power of Love at the beginning of the last century we eventually experienced the phenomenon of the so called Bohemians, those that went to Paris in the

attempt to live a life free from Victorian repression; in the United States, the Beats, who had no choice but to live in Greenwich Village or San Francisco for similar reasons. These people created their works in the most squalid conditions and against the greatest odds of accomplishing anything. "Howl" is a work of art depicting and expressing that prospective of the Eisenhower and McCarthy era by one who lived and observed it, the Poet/photographer of the Beats, Allen Ginsberg.

Sound recordings of these works as well as those of; D. H Lawrence, Joyce, Henry Miller &c are in the WHRW Library. They are there to be played in their entirety not mutilated with bleeps like Ed Meese putting little black things over human body parts depicted in marble. To now hide these works away, so that Eisenhower/McCarthy Era repression may be necromancized by Conservatives is the allegorical equivalent of stomping on the hearts and souls of these various artists, reserving their works for the privileged few to whom nothing in a plutocracy is censored; and obfuscating from the Public at large and student alike the unnecessary strife that those other daring few, endured and overcame to show us what they saw, what they lived and experienced so that we could taste and feel those parts of life otherwise impossible for us to ever know.

Therefore, if the 1st Amendment of Our U.S. Constitution is a component part of Binghamton University's policy in re education then it cannot be set aside in conjunction with the WHRW radio station to which you hold the broadcasting license. Consequently, the reasonable person of average sensibilities has to ask themselves: (l) Is the College

Board of Trustees, intention to show young people and the community through stratified coercion, abuse of power and misrepresentation how they must knuckle under and submit to tyranny. Like those that joined in on Hitler's book burning or the destruction of modern art; or (2) do you want to enrich the lives of students and the community by presenting to them the rest of human life and experience as to create well rounded individuals capable of making serious far reaching social decisions in this Nation and other parts of the World?

October 3, 2005:
Broome County, NY

Principiis Obsta:
Thomas Lamont Dyno
46 Academy Street
Johnson City, New York
13790-1519
607-729-0839

A copy of this notice shall be forwarded to the NYCLU and the WHRW General Manager.

[i] BINGHAMTON UNIVERSITY: The Report of the President's Commission on Free Speech and Academic Freedom Executive Summary May 1992

http://www.binghamton.edu/home/1ibraries/freespeech.html#members

http://ombudsman.binghamton.edu/freespeech.htm

[ii] http://www. fcc.gov/eb/forms.ifcc100.html

http://www.fcc. Gov/eb/broadcast/opi.html

http://www. fcc.gov/parents/content.html

[iii]

http://www.law.umkc.edu/facultv/projects!ftriais/bruceibruceaccount.html

http://www.law.seattleu.edu/fachome/skover/trialsoflennybrucc/

http://www.library.ucla.eduilibraries/specialibeats./faithful.htm

[iv] Nor their friends in local government or elsewhere, as to gain access to bank, brokerage accounts, how many cell phones, hand guns, false teeth, moles venereal diseases or tests therefore I may have, had &c.

BINGHAMTON UNIVERSITY
State University of New York
P0 Box 6000
Binghamton, New York 13902~6000
OFFICE OF THE PRESIDENT
607-777-2131, FAX 607-777-0533

October 27, 2005

Mr. Thomas Lamont Dyno
46 Academy Street
Johnson City, NY 13790-1519

Dear Mr. Dyno:

Thank you for your letter of October 3, 2004 [sic] regarding WHRW, our campus radio station.

Please be advised that the University's involvement with WHRW is limited to issues of the license and Federal Communications Commission (FCC) controls and guidelines. All programming is decided by the WHRW Board of Directors and Program Director. The Station Manager is responsible for the overall operation of the station. As such, the University Administration has no role in determining content or structure of the programming.

Please also be advised that any person, campus or community, is permitted to submit a proposal to the appropriate department of the station to do a show. It is my understanding that many community members participate in the station and have shows in addition to our students. If you are interested in submitting ideas for a show or other participation, please contact WHRW directly.

Sincerely,
Lois B. DeFleur - President

PUBLIC NOTICE
Federal Communications Commission
445 Twelfth Street SW
Washington, D.C. 20554

News media information 202 / 418-0500 Recorded listing of releases and texts 202 /418-2222

REPORT NO. 26160 Broadcast Applications
1/27/2006

STATEFILE NUMBERE/P, CALL LETTERS APPLICATION AND LOCATION, NATURE OF APPLICATION

FM STATION APPLICATIONS FOR RENEWAL ACCEPTED FOR FILING

NY BRED-20060124AAQ E
WHCL-FM 68224
88.7 MHZ
TRUSTEES OF HAMILTON
COLLEGE
NY, CLINTON
Renewal of License.

NY BRH-20060124ACA E
WCLX 72034 E
102.9 MHZ
WESTPORT BROADCASTING
NY, WESTPORT
Renewal of License.

NY BRH-200601 24ACW E
WIII 9427
99.9 MIIZ
CITADEL BROADCASTING COMPANY
NY, CORTLAND

Renewal of License.

NY BRH-20060124ADY E
WJZR 49193
105.9 MHZ
NORTH COAST RADIO, INC.
NY, ROCHESTER
Renewal of License.

NY BRED-20060124AJW E
WHRW 63105
90.5 MHZ
STATE UNIVERSITY OF NEW YORK AT BINGHAMTON
NY, BINGHAMTON
Renewal of License.

WHRW 90.5 FM
Binghamton University Box 2000 Binghamton, NY, 19302-6000
Office 607 777 2139 Fax 607 777 4958

March 9, 2006

Tom Dyno,

It has been brought to my attention that the phrase "you're not worth shitting on" was played on the air at about 4 AM on Sunday March 5, 2006. This is against WHRW policy and therefore, absolutely cannot be played EVER.

The existence of WHRW is made possible by the dedication of its volunteer DJs, but that means that everyone must take their responsibilities to the station seriously to ensure that the station complies with all FCC rules and regulations.

As a cleared WHRW DJ, you have been taught and have taken a clearance test regarding the FCC regulations as well as our station rules. I consider this a warning. However, if this happens again, I will be forced to cancel your show.

If you have any questions or problems regarding your membership with the station or with the policy described above, please feel free to e-mail me swolf1 @binghamton.edu.

Sincerely,

Stefanie Wolf

WHRW 90.5 FM

Binghamton University Box 2000 Binghamton, NY, 19302-6000

Office 607 777 2139 Fax 607 777 4958

March 18 2006

Tom Dyno,

During your show from 10pm March 11th to 2 AM March 12th, you deliberately played material containing words you knew to be contrary to WHRW's rules and regulations. You also failed to log a station ID for the hours of 2200 and 0100 as well as failed to log a sign-off cart. As a cleared DJ who has taken and passed the WHRW clearance exam, you know that the FCC requires WHRW to air a station ID within 5 minutes of each hour and also requires that the information in the sign-off cart be played before broadcast ends.

As of this moment, your clearance has been suspended pending a board meeting at 7pm on Thursday March 23rd 2006 in room WBO8 (next door to the station). At this meeting you will be able to speak on your behalf and the future of your clearance at WHRW will be discussed.

Richard Bellin

Office of theUniversity Counsel
THE STATE UNIVERSITY *of* NEW YORK
Binghamton University
P0 Box 6000
Binghamton, New York
13902-6000
6077774438 fax -6077776453

December 1, 2009

Thomas Lamont Dyno
46 Academy Street
Johnson City, NY 13790-1519

RE: FOIL request received November 24, 2009

Dear Mr. Lamont Dyno

Please be advised that the above-referenced FOIL request is approved in part and denied in part. It is partially denied in accordance with New York State Public Officers Law §89(2) (b) in that certain information contained within the requested documentation has been redacted to avoid an unwarranted invasion of personal privacy. Enclosed please find 2 pages of responsive documentation.

You have the right to appeal the (partial) denial of the documents requested above. Appeals should be addressed to Rose Marie Scrodanus, Records Appeal Officer, University Counsel's Office, SUNY, State University Plaza, Albany, NY 12246.

Yours truly,
Barbara Westbrook Scarlett
Records Access Officer

7,8,9. Date Reported (Day, Date, Time SATURDAY 03/18/2006 23:15	10, 11, 12. Occurred On/From (Day, Date, Time SATURDAY 03/18/2006 23:00	13, 14, 15. Occurred Tp (Day, Date, Time
16. Incident Type HARASSMENT-HARASSMENT	17. Business Name	
19Incident Address (Street Name, Bldg. No., Apt. No.) UNIVERSITY UNION WEST APT#B06		
20. City/State/Zip BINGHMATON UNIVERSITY, NEW YORK 13902		

21. Locatioin Code (TSLED)	23. No. of Victims	24. No. of Suspects	26. Victim also Complainant
VESTAL TOWN 0464	1	1	NO
Location Type OTHER PUBLIC ACCESS BUILDING			

1	PL 240.26 03		V	2	C	HARASSMENT 2ND	1

ASSOCIATED PERSONS

SUSPECT	DYNO, THOMAS, L.	01/26/1955	46 ACADEMY ST JOHNSON CITY NY 13790	
VICTIM	BELLIN, RICHARD, A.	[redacted]		

VICTIM

Name BELLIN, RICHARD, A.
27. DOB [redacted]
28. Age [redacted]
29. Gender MALE
30. Race WHITE
31. Ethnicity NOT HISPANIC
32. Handicap
33. Residence

SUSPECT

Person ID 12371
34. Type SUSPECT
35. Name (Last, First, Middle DYNO, THOMAS, L.
36. Apparent Condition
37. Address (Street Name, Bldg., Apt. No., City, State, Zip)
46 ACADEMY STREET JOHNSON CITY NY 1390

NARRATIVE

Date of Action	Date Written	Officer Name & Rank
03/19/2006	03/19/2006	PETTIT, MARTIN (OFFICER)
Narrative		
Office Rado and myself responded to WHRW radio station for a DJ that refused to leave. Upon arrival patrol was met by the station manager Richard Bellin who stated the DJ Dyno had been informed that he was no longer able to use WHRW. Bellin further stated that Dyno had refused to leave and got in victim's "face" and acted in an aggressive manner towards Bellin. I asked Dyno for his information and initially he refused but after a few moments he complied and gave his NY Drivers License. Dyno was told to leave WHRW and that he was not to be in the area again until a WHRW board meeting on Thursday. Dyno complied and left without incident. Bellin did not want any action taken against Dyno but did inform patrol that he had been removed from the access list pending the board meeting. Patrol cleared.		

74. inquiry DMV CH WW; 75. NYSPIN Message No. blank. 76. complainant signature blank. 77. Reporting Officer: Martin Pettit; 78. ID # 17; 79 Supervisor Signature: Lt. Thomas Cuddy; 80. ID # 0205; 81. Closed by Investigation; 82. Status Date: 3/19/2006. 83. Notified/TOT blank; Solvability total 7.

March 24, 2006

Tom Dyno,

After two separate incidents involving WHRW rules violations and a board meeting to hear your defense, it has been the decision of the WHRW board to suspend your clearance, starting immediately, and lasting until Summer 2007. At this point, you will have to reapprentice and take the clearance exam in order to regain your status as a WHRW member and engineer.

If you wish to contact me regarding this matter, please email me at swolf@binghamton.edu.

Stefanie Wolf
Program Director

THOMAS LAMONT DYNO
46 Academy Street
Johnson City, New York 13790-1519
607-729-0839

Lois B. DeFleur --- President
S .U.N.Y. Binghamton
P0 Box 6000
Binghamton, New York 13902-6000

Dear Madam President:

PLEASE TAKE NOTICE -- My broadcasting privileges on WI{RW were arbitrarily revoked on March 23, 2006 until the Summer of 2007 for airing protected speech within the FCC acknowledged "safe harbor zone" of 10 pm to 6 am local time. Said act of revocation is in violation of the due process clause of the 14th and 1st Amendments to the US Constitution.

There is a simple solution to avoid otherwise unnecessary and costly litigation.

In your letter of October 27, 2005 you acknowledge that you and your fellow trustees hold the broadcasting license to WHRW and that

> "[The University's involvement with WHRW is limited to issues of the license and Federal Communications Commission (FCC) controls and guidelines"

PLEASE TAKE FURTHER NOTICE that the "safe harbor zone" in which the alleged acts complained of took place is a category within the "(FCC) control[s] and guideline[s]" which WHRW has now chosen to ignore under the present General Manger Rich Bellin in order to arbitrarily censor protected speech, which in this case is to my injury in fact.

WHRW's existence as a low power fm broadcasting radio station is totally dependent upon Binghamton University for it's continuing existence and under precedent of Burton *v* Wilmington Parking Authority 365 U.S. 715, 725 is required to conform to the supreme law of the land *inter alia* it has no right to violate the US Constitution nor to deprive persons of rights protected thereunder, such as Freedom of Speech'.

So while a Judge would ask, what is your compelling state interest in allowing WHRW General Manger Rich Bellin and Program Director Stephanie Wolf to use WHRW to censor speech, the reasonable person would simply ask why are you allowing them to do this?

Is it because in 1955 you didn't like Allen Ginsberg and Lawrence Ferlinghetti prevailing against obscenity charges for the poet's work "Howl" which is presently banned by your station along with the works of William S. Burroughs, Lenny Bruce, Edgar Allen Poe and in fact any works that contain *words* that your General Manager Rich Bellin" doesn't like?

PLEASE TAKE FURTHER NOTICE that individual *words* by the FCC's own express policy cannot be banned from being aired in the "safe harbor zone" Cohen *v* California 40 US *15,* 24. Prosecutions based on banned words did not prevail and are now rendered obsolete by NYS Penal Law §235 consonant with the US Supreme Court's decision in Miller *v* California 413 US *15,* 23, 27-28, 30. Yet, in this day and age, the President of a NYS University with one hand publishes a reasonable University Freedom of Speech Policy" and with the other hand uses

unsophisticated young adults to ban speech that was declared protected 50 years ago. This Madam President is incontrovertibly the most astounding display of hypocrisy occurring anywhere in the educational universe of today People *v* PJ Video. Inc 68 NY 2d 296.

What possible justification could you now have for doing or allowing said censorship and deprivation of Federally protected rights to occur and thus leave me or any similarly situated persons with no other remedy than to commence costly Federal litigation as the direct result of your inaction *inter alia* application of your Freedom of Speech policy to execute an honorable solution consonant with the supervisory role you've already acknowledged to exist - *e.g., It is Hereby Resolved:* that Thomas Lamont Dyno's broadcasting privileges at WHRW are hereby restored, that all WHRW policies and broadcast policy shall be conformed to the University Freedom of Speech Policy and U.S. law any WHRW policy contrary thereto notwithstanding *and furthermore* that WHRW shall refrain from the revocation of broadcasting privileges from persons airing Constitutionally protected speech in the 10 pm to 6 am "safe harbor zone".

PLEASE TAKE FURTHER NOTICE -- There is no compelling state interest for you to allow violations of the US Constitution such as those described herein to be perpetrated by your WHRW General Manger nor its board.

As it now stands, your Freedom of Speech policy not only needs, renewal, it needs application otherwise it's nothing more than eye-candy. I respectfully

request that you reconsider your position and adopt the honorable and magnanimous solution as proposed herein.

Principiis Obsta
Thomas Lamont Dyno

Enclosed: My "Media release" and presentation to the WHRW Station board.

PLEASE TAKE NOTICE that no fair procedure was provided for fair review and ventilation of crucial Constitutional issues raised. My privilege was revoked and my speech quashed without due process of law. By improper and illegal acts of the individuals presently in charge of WHRW said station is a censorship mechanism aided and abetted by the State with public funds.

"The Report of the President's Commission on Free Speech and Academic Freedom Executive Summary May 1992 § II. A

> "[A] public educational institution as a state agency is legally required to protect its members' First Amendment rights".

Said Report shall hereinafter be referred to as University Freedom of Speech Policy which is available online here:

http://www.binghamton.edu./home/librariesifreespeech.html

> "Since public campuses depend upon public financing, institutional autonomy faces legislative control as well as judicial scrutiny. But the Supreme Court has spoken decisively on the issue of academic speech, stating that

"the university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment." *Rust v. Sullivan* 59 USLW 4451 (US May 21, 1991), p. 4458, citing *Keyishian v Board of Regents* 385 US 589, 603, 605-6 [19871".

[ii] Or whoever it is that is actually calling the shots for him and potentially his successor(s)

[iii] "University Freedom of Speech Policy" introduction

"Binghamton University has not adopted a "speech code," and the Commission recommends against doing so in the future. Not only are public universities held to a special standard under the First Amendment, but the Binghamton campus has a strong tradition of tolerating and encouraging diverse views. Our challenge, as it is on all campuses, is to build a multicultural community characterized by reasoned debate and dialogue. At the same time, we must guarantee, for each individual, the rights of free expression which, the courts have declared, transcend our collective desire for community and even, at times, civility. Clearly, our community bonds must be nurtured by a variety of mechanisms, but I believe we have the best chance for success if

we concentrate on what we do best: education"
-- Lois B. DeFleur

PLEASE TAKE NOTICE - on or around April 24, 2006 said WHRW General Manager Rich Bellin intends to present to station members a list of words he intends to ban 24 hours a day. Said action as explained in my enclosed presentation has already been ruled unconstitutional by the US Supreme Court and thus has no basis in FCC policy: which is clear and unambiguous from their website and the materials I've provided. If you act to restore my privilege and proscribe this censorship policy you will prevent further damage from occurring by the introduction of said obsolete Eisenhower Era form of censorship struck down by the US Supreme Court in the early 1970s and thus you will be acting in accordance with your own express Freedom of Speech policy if not then you're *acting* contrary thereto *see* "action on non-action" Yick Wo *v* Honkins 118 US 356, 373 *cf* Catlette *v* United States, (4th Cir.) 132 F.2d 902 as cited in Adickes *v* Kress Co. 398 U.S. 144, 212, 230 *cf* Slate of Missouri *ex rel* Gaines *v* Canada 305 U.S. 337.350-352.

University Freedom of Speech Policy § III-1.

> "There should be no additional rules restricting freedom of speech on campus and no actions that conflict with First Amendment rights, which include constitutional academic freedom".

Id 5-7

6. Departments and other units should have grievance policies and procedures which should be updated periodically. They should inform faculty,

staff, and students of thesepolicies and procedures and their availability at unit offices. All grievance policies should include a statement on the basic rights of freedom of expression and academic freedom.

7. Additional confidential avenues should be made available for students seeking advice before proceeding with a formal grievance. The Provost and the Vice President for Student Affairs should identify specific faculty and staff advisors who are knowledgeable in the area of freedom of expression and would be available to students when such questions arise in the classroom and other campus contexts. These advisors could work in coordination with the SA ombudsperson.

One of the necessary elements in ensuring that members of our community respect one another's rights of freedom of expression and academic freedom is education about these rights and the concomitant responsibilities. It is important, however, that this burden not fall on any one segment of our University but be evenly shared.

Id, § 4. The Commission proposes adoption of the following or similar shared values for our entire campus community (adapted from The Carnegie Foundation for the Advancement of Teaching. *Campus Life: In Search of Community* (1990), pp. 7-8.)...

Second, Binghamton strives to be an open community, a place where freedom of expression is uncompromisingly protected and where civility is powerfully affirmed.

The University's traditions also play an important

role in setting its expectations. Access to a quality education was one of the founding traditions of Binghamton University from its inception as Harpur College, which sought to open the doors of higher education to many students who had been denied access because of prejudice or lack of funds. From the appearance of Communist historian Herbert Aptheker in 1961 to that of CUNY professor Leonard Jeffries in

1992, Binghamton has resisted the efforts of those who would declare certain ideas off limits.

The University's tradition is that a placid climate is to be avoided, not envied; that contentious ideas are addressed through vigorous debate and sometimes protest. Some at Binghamton can recall the student strikes and teach-ins of the Vietnam War and the extraordinary efforts made to maintain an open dialogue not only with each other but also with the local community. Civility, often in the eye of the beholder and not required by the First Amendment, has been absent on occasion, causing consternation and reminding the community how fragile the values of academic freedom are without it.

Binghamton, like all Universities, should strive for an environment wherein it is never unacceptable to disagree with the opinion of others. No campus groups or individuals should feel that they are not free to speak out, and they should understand the significance of seeking to deny that right to others. To inhibit free expression not only infringes a basic right, it destroys our sense of community.

These traditions and expectations have to be periodically renewed to ensure their relevance for

new generations within the university community. In 1972, Supreme Court Justice William O. Douglas said, "If we are to become an integrated, adult society, rather than a stubborn status quo opposed to change, students and faculties should have communal interests in which each age learns from the other. Without ferment of one kind or another, a college or university...becomes a useless appendage to a society which traditionally has reflected the spirit of rebellion" *Healy* 1'. *James* 408 U.S. 169 (1972).

At Binghamton this latest renewal reaffirms our campus tradition that the full exercise of freedom of expression is encouraged and protected. As we address the particular challenges of a diverse community, the expectation is that these rights are practiced with respect and responsibility, and with the recognition that abridging the rights of any one person or group ultimately endangers the rights of all. In this way we shall balance our ideals of Binghamton University as both a marketplace of ideas and a scholarly community".

[**Please Take Notice for US S Ct** - as shown on record the following US Mail Receipt number appeared at the bottom of each page "US Cert. Mail Receipt # 7099 3220 0010 3488 2996" –]

STATE OF NEW YORK} AFFIDAVIT OF SERVICE
COUNTY OF BROOME}ss:. U. S. CERTIFIED MAIL

I the undersigned being duly sworn depose and say that I am over 18 years of age and on March 27, 2006 I served upon Lois B. DeFleur the following annexed papers (1) a document entitled "Media Release" for release on March 23, 2006 at 6 pm or thereafter (2) a document entitled "Vindication" (3) a document in the form of a letter dated October 27, 2005 issued by Lois B. DeFleur and addressed to Mr. Thomas Lamont Dyno and (4) an "affirmation of authenticity and content" dated March 27, 2006: by depositing said papers enclosed in a 1st class post paid wrapper bearing US Certified Mail article number 7099 322000103488 2996 Return Receipt Requested and said envelope addressed to Lois B. DeFleur -- President of the State University of New York at Binghamton P.O. Box 6000 Binghamton, New York 13902-6000 as the address designated by said person in the U.S. Post Office located on Main Street in the Village Johnson City New York County of Broome. Attached herewith are true and authentic copies of a cash receipt, return receipt and the receipt of service signed and returned further evidencing said transaction and occurrence.

_____
Julia Dyno

Sworn to before me this 4 Day
Of April, 2006

KRISTIN DUTCHER
No 01 ME5045742
Notary Public. State of New York
My Commission Expires 06/28/2007

WHRW expects all DJs to follow the following WHRW policies concerning Obscenities, Indecency and Profanity:

The FCC's definition of Obscenity is material which is in the prurient interest, sexual in nature and lacking scientific, literary, artistic or political value. WHRW follows the FCC definition.

The WHRW definition of profanity is words or material that can be interpreted or profane or vulgar. Examples of profane language include: swearing, expletives and obscene language. WHRW follows this definition.

A 24 hour ban of obscenities and profanity is in effect at WHRW. The following are examples of obscene and profane material: "Fuck", "Motherfucker", "Asshole", "Shit", and other words, phrases or material that fit the two definitions as defined by the FCC, the WHRW Program Director or the WHRW General Manager.

The FCC's definition of Indecency is material which is sexual or excretory in nature but not rising to the vulgarity of profanity or obscenities.

WHRW allows indecent material to be aired with a general disclaimer between the hours of 10pm and 6am.

Signed by station General Manager Mike Saltzman

What are the statutes and rules regarding the broadcast of obscene, indecent, and profane programming? Title 18 of the United States Code, Section 1464, prohibits the utterance of "any obscene, indecent or profane language by means of radio communication." Consistent with a subsequent statute and court case, the Commission's rules prohibit the broadcast of indecent material during the period of 6 a.m. and 10 p.m. FCC decisions also prohibit the broadcast of profane material between 6 a.m. and 10 p.m. Civil enforcement of these requirements rests with the FCC, and is an important part of the FCC's overall responsibilities. At the same time, the FCC must be mindful of the First Amendment to the United States Constitution and Section 326 of the Communications Act, which prohibit the FCC from censoring program material, or interfering with broadcasters' free speech rights.

What makes material "obscene?" Obscene speech is not protected by the First Amendment and broadcasters are prohibited, by statute and regulation, from airing obscene programming at any time. According to the U.S. Supreme Court, to be obscene, material must meet a three-prong test: (1) an average person, applying contemporary community standards, must find that the material, as a whole, appeals to the prurient interest (i.e., material having a tendency to excite lustful thoughts); (2) the material must depict or describe, in a patently offensive way, sexual conduct specifically defined by applicable law; and (3) the material, taken as a whole, must lack serious literary, artistic, political, or scientific value. The Supreme Court has indicated that this test is designed to cover hard-core

pornography.

What makes material "indecent?" Indecent material contains sexual or excretory material that does not rise to the level of obscenity. For this reason, the courts have held that indecent material is protected by the First Amendment and cannot be banned entirely. It may, however, be restricted to avoid its broadcast during times of the day when there is a reasonable risk that children may be in the audience. The FCC has determined, with the approval of the courts, that there is a reasonable risk that children will be in the audience from 6 a.m. to 10 p.m., local time. Therefore, the FCC prohibits station licensees from broadcasting indecent material during that period.

Material is indecent if, in context, it depicts or describes sexual or excretory organs or activities in terms patently offensive as measured by contemporary community standards for the broadcast medium. In each case, the FCC must determine whether the material describes or depicts sexual or excretory organs or activities and, if so, whether the material is "patently offensive."

In our assessment of whether material is "patently offensive," context is critical. The FCC looks at three primary factors when analyzing broadcast material: (1) whether the description or depiction is explicit or graphic; (2) whether the material dwells on or repeats at length descriptions or depictions of sexual or excretory organs; and (3) whether the material appears to pander or is used to titillate or shock. No single factor is determinative. The FCC weighs and balances these factors because each case presents its

own mix of these, and possibly other, factors.

What makes material "profane?" "Profane language" includes those words that are so highly offensive that their mere utterance in the context presented may, in legal terms, amount to a "nuisance." In its Golden Globe Awards Order the FCC warned broadcasters that, depending on the context, it would consider the "F-Word" and those words (or variants thereof) that are as highly offensive as the "F-Word" to be "profane language" that cannot be broadcast between 6 a.m. and 10 p.m.

What is the "safe harbor"? The "safe harbor" refers to the time period between 10 p.m. and 6 a.m., local time. During this time period, a station may air indecent and/or profane material. In contrast, there is no "safe harbor" for the broadcast of obscene material. Obscene material is entitled to no First Amendment protection, and may not be broadcast at any time.

Are there certain words that are always unlawful? No. Offensive words may be profane and/or indecent depending on the context. In the Golden Globe Awards Order, the FCC stated that it would address the legality of broadcast language on a case-by-case basis. Depending on the context presented, use of the "F-Word" or other words as highly offensive as the "F-Word" may be both indecent and profane, if aired between 6 a.m. 10 p.m.

Does the FCC monitor particular radio or television programs? The First Amendment to the U.S. Constitution and Section 326 of the Communications Act prohibit the FCC from censoring broadcasters. The FCC does not, therefore,

monitor particular programs or particular performers, but rather enforces the prohibition on obscenity, indecency and profanity in response to complaints.

Does the FCC regulate violence on television? The FCC does not currently regulate the broadcast of violent programming. On July 28, 2004, however, the FCC opened an inquiry into violent programming and its effect on children. The FCC has received public comments and opinions from many segments of the public. The FCC will publish and make available the report resolving the inquiry on the FCC web site.

Do the FCC's rules apply to cable and satellite programming? In the past, the FCC has enforced the indecency and profanity prohibitions only against conventional broadcast services, not against subscription programming services such as cable and satellite. However, the prohibition against obscene programming applies to subscription programming services at all times.

What monetary sanctions has the FCC imposed for violation of its indecency, profanity, and obscenity restrictions? The base monetary sanction for violation of the FCC's indecency, profanity, and/or obscenity restrictions is $7,000 per violation. The FCC may adjust this monetary sanction upwards, up to a current statutory maximum of $32,500 per violation, based on such factors as the nature, circumstances, extent and gravity of the violation, and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.

GMAIL
Your status with WHRW has changed.
3 messages
Mike Saltzman <mike518@nycap.rr.com>
Mon, Jul 9, 2007 at 10:05 PM
TO:
"Hagerbaumer, David"
Tom Dyno

Sorry to bombard you with emails, just wanted to give you a final update as to your status with our station. Today we held a WHRW board of directors meeting. At this board meeting we discussed your status with the station. By unanimous 6-0 vote, we as a board, voted to Persona Non Grata (or ban) you from the station indefinitely.

If you have additional questions about your access to the University (aside from WHRW), you can refer them to David Hagerbaumer, Director of Campus Life.

Mike Saltzman
WHRW General Manager

Mon, Jul 9, 2007 at 10:44 PM
To: Elijah Weber-Han —

You with Kate kind of like the situation Hangela was in - live and learn [Quoted text hidden]

Elijah Weber-Han
Thu, Jul 12, 2007 at 9:44 PM
This is News to me. I not been informed of any such meeting. The only reason I have been incommunicado is because of a toothache. [Quoted text hidden]